Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIA ANTONIETA PLASENCIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a permanent resident alien who has been detained at the border on a charge of aiding the illegal entry of aliens into this country is entitled to have the issues of his entry and excludability determined in deportation, rather than exclusion, proceedings.

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MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIA ANTONIETA PLASENCIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Michael Landon, District Director of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 637 F.2d 1286. The report and recommendation of the magistrate, as adopted by the district court (App. B, *infra*, 12a-22a), are not reported. The opinions of the Board of Immigration Appeals (Apps. C and D, *infra*, 23a-25a, 26a) and of the immigration judge (App. E, *infra*, 27a-30a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. F, *infra*, 31a) was entered on November 7, 1980. A petition for rehearing was denied on February 26, 1981 (App. G, *infra*, 32a). On May 20, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including July 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, are set forth at App. I, *infra*, 34a-38a.

STATEMENT

1. Respondent, a native and citizen of El Salvador, was admitted to the United States for permanent residence in 1970 (App. A, *infra*, 2a). On June 29, 1975, respondent was returning to this country from a two-day trip to Mexico with her husband when she was arrested at the border for attempting to smuggle six aliens into the United States (*ibid.*; App. B, *infra*, 16a). Pursuant to 8 U.S.C. 1225(b), respondent was detained pending a proceeding to determine whether she was excludable under 8 U.S.C. 1182(a)(31), which provides for the exclusion of any alien who, knowingly and for gain, aids the illegal entry or attempted entry of another alien into the United States (App. C, *infra*, 24a; App. E, *infra*, 27a-28a).

The evidence at the exclusion hearing showed that on June 27, 1975, respondent and her husband traveled to Tijuana, Mexico, where they met with several nonresident aliens and made preparations to facilitate the illegal entry of the aliens into the United

States.[1] Two of the aliens, Anna Lopez and Luis Polio-Medina, testified that respondent supplied them with alien registration cards that belonged to her children and agreed to transport them by automobile to Los Angeles. Lopez testified further that she had agreed to pay respondent $250 after she obtained work in this country; Polio testified that it was his understanding that other individuals had made arrangements to pay respondent $200 after his arrival in Los Angeles (App. E, *infra*, 28a-29a; R. 94-100, 106-111). Respondent admitted that she had agreed to transport the aliens and that she had furnished them with her children's registration cards. She contended, however, that the only payment involved was $25 that her husband had received to purchase gasoline (App. E, *infra*, 28a; R. 88-93).

The immigration judge found that there was "clear, convincing and unequivocal" evidence that respondent "did knowingly and for gain" assist Lopez and Polio to enter or attempt to enter the United States illegally, in violation of 8 U.S.C. 1182(a)(31) (App. E, *infra*, 29a).[2] He also found (*id.* at 30a)

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[1] At the commencement of the hearing, respondent, who was accompanied by her husband, was advised that she would have the opportunity to object to evidence presented against her, to cross-examine witnesses and to present evidence on her own behalf (R. 83-84; "R." refers to the record in the court of appeals). In addition, respondent was advised of her right to be represented by counsel, and she expressly waived that right (R. 83).

[2] The immigration judge found that the testimony of Lopez and Polio was "accurate and reflect[ed] the events that actually occurred," whereas respondent's testimony was "incredible and not worthy of belief" (App. E, *infra*, 29a). In addition, the judge observed (*id.* at 29a-30a) that even if respondent's version of the events were credited, the $25

that because respondent had engaged in conduct that was contrary to a policy reflected in the immigration laws, her departure from the United States was meaningfully interruptive of her residence in this country under the doctrine of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). In accordance with this finding, the judge concluded that upon her return to the United States respondent was making an "entry," within the meaning of 8 U.S.C. 1101(a)(13), and was therefore subject to exclusion (App. E, *infra*, 30a). The judge ordered respondent excluded and deported (*ibid.*).

The Board of Immigration Appeals dismissed respondent's administrative appeal (App. D, *infra*, 26a) and denied her motion to reopen (App. C, *infra*, 23a-25a).[3]

2. Thereafter, on March 18, 1976, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California, challenging the exclusion order.[4] The matter was referred to a magistrate, who concluded that in the case of a permanent resident alien the issues of entry and excludability may not be determined in an exclusion proceeding because of the alleged absence of "procedural safeguards" at exclusion

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payment for gasoline, which she conceded, was sufficient evidence of gain to establish her excludability under 8 U.S.C. 1182(a)(31).

[3] In denying reopening, the Board rejected respondent's contentions that she was not attempting an "entry" under *Rosenberg* v. *Fleuti*, *supra*, and that she did not intelligently waive her right to counsel (App. C, *infra*, 24a-25a).

[4] On September 19, 1975, respondent was paroled into the United States pending review of the exclusion order (R. 3, 4).

proceedings (App. B, *infra*, 13a, 20a-21a). Accordingly, the magistrate recommended that the case be remanded to the Immigration and Naturalization Service with instructions to proceed against respondent, if at all, only in deportation proceedings (*id.* at 13a, 21a). The district court adopted the magistrate's report and recommendation (*id.* at 21a-22a; App. H, *infra*, 33a).

A divided panel of the court of appeals affirmed (App. A, *infra*, 1a-11a). The majority observed that an alien is excludable only if his coming into the United States is an "entry" within the meaning of 8 U.S.C. 1101(a)(13), and that under *Rosenberg* v. *Fleuti*, *supra*, the return of a permanent resident alien following a brief trip abroad is an "entry" only if the trip was "meaningfully interruptive" of the alien's residence in this country (App. A, *infra*, 3a). However, the majority rejected the immigration judge's findings, made at the conclusion of the exclusion hearing, that respondent made an "entry" and was excludable because she had attempted to smuggle aliens across the border (*ibid.*). Instead, expressing its understanding that exclusion proceedings do not satisfy the due process requirements established in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), and *Kwong Hai Chew* v. *Rogers*, 257 F.2d 606 (D.C. Cir. 1958) (App. A, *infra*, 4a-5a),[5]

[5] In *Kwong Hai Chew* v. *Colding*, *supra*, 344 U.S. at 602-603, this Court held that a permanent resident alien may not be excluded at the border without being given "reasonable notice of the charges against him and allowing him a hearing sufficient to meet the requirements of procedural due process." Following remand, the D.C. Circuit, in *Kwong Hai Chew* v. *Rogers*, *supra*, held that a permanent resident alien is entitled to a hearing at which the government is the moving party and has the burden of proof. See pages 13-14, *infra*.

the majority held that whenever "a permanent resident alien is returning from a visit abroad and the question is whether the visit was 'meaningfully interruptive' of the alien's American residence * * * the issues of 'entry' and excludability must be litigated in deportation proceedings" (*id.* at 6a-7a), which, the majority believed, "are subject to much more stringent procedural safeguards than exclusion proceedings" (*id.* at 3a).[4]

Judge Wallace dissented. Relying on *Rosenberg* v. *Fleuti*, *supra*, Judge Wallace concluded that respondent's "attempt to smuggle illegal aliens across the border made her departure from the United States meaningfully interruptive of her permanent residence. She was thus subject to exclusion on her attempt to enter the country" (App. A, *infra*, 11a).

REASONS FOR GRANTING THE PETITION

The court of appeals has incorrectly decided an important question of immigration law by essentially ignoring the statutory scheme created by Congress in the exercise of its plenary authority over immigration matters. Under the clear terms of the Immigration and Nationality Act, exclusion proceedings "shall be the sole and exclusive procedure for determining admissibility of a person to the United States * * *." 8 U.S.C. 1226(a). See S. Rep. No. 1137 (Pt. 1), 82d Cong., 2d Sess. 29 (1952); H.R. Rep. No. 1365, 82d

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[4] The majority noted that if the Service can meet its burden at the deportation hearing "of showing that the alien made an 'entry' and was excludable at the time of the 'entry,' then, of course, the alien is deportable pursuant to * * * 8 U.S.C. § 1251(a)(1)" (App. A, *infra*, 7a). 8 U.S.C. 1251(a)(1) provides for the deportation of any alien who was excludable at the time of entry.

Cong., 2d Sess. 56 (1952). Thus, Congress contemplated that all persons who fall within the statutorily defined classes of excludable aliens may be excluded from this country following exclusion proceedings held at or near the border. This understanding of the statutory scheme was reflected in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), where this Court assumed that resident aliens were subject to exclusion proceedings, but carved out a small exception for those whose departure was "innocent, casual, and brief" (*id.* at 461), which respondent's was not.

The court of appeals nevertheless held that the Immigration and Naturalization Service must permit a permanent resident alien to litigate the issues of "entry" and excludability in deportation, rather than exclusion, proceedings. In reaching this result, the court mistakenly believed that exclusion hearings do not provide permanent resident aliens with certain basic procedural protections, including the requirement that the government be the moving party and bear the burden of proof. See *Kwong Hai Chew* v. *Rogers*, 257 F.2d 606 (D.C. Cir. 1958). In fact, however, these protections are afforded at exclusion proceedings to aliens with colorable claims to permanent resident status. Moreover, even if the protections available to permanent residents at exclusion hearings do not satisfy due process requirements, the proper remedy is to order the INS to provide the necessary safeguards at exclusion proceedings, not to alter the statute by requiring the Service to proceed against excludable resident aliens only in deportation proceedings.

Unless the decision below is overturned, the INS will be forced, contrary to the express intent of Congress, to admit excludable aliens into this country and to provide them with the more elaborate deporta-

tion proceedings and with the opportunity to apply for various forms of discretionary relief that are available only in the deportation context. This Court should grant review in this case to correct the manifestly erroneous decision of the court of appeals, which substitutes its own preferred procedures for the procedural framework established by Congress. Cf. *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981), slip op. 5.

1. It is well settled that Congress exercises extremely broad powers over immigration matters, including the admission of aliens into the United States. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). In enacting the Immigration and Nationality Act of 1952, Congress recognized that our immigration laws have long made a distinction between aliens who arrive at the border seeking admission and aliens who are within the United States after an entry, regardless of its legality. As the Court noted in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958) (footnotes omitted), the Act preserves this distinction by establishing two separate schemes:

> Chapter 4 subjects those seeking admission to "exclusion proceedings" to determine whether they "shall be allowed to enter or shall be excluded and deported." 66 Stat. 200, 8 U.S.C. § 1226(a). On the other hand, Chapter 5 concerns itself with aliens who have already entered the United States and are subject to "expulsion," as distinguished from "exclusion" if they fall within certain "general classes of deportable aliens." 66 Stat. 204, 8 U.S.C. § 1251. Proceedings for expulsion under Chapter 5 are commonly referred to as "deportation proceedings."

See 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* ¶ 3.18, at 3-177 to 3-179 (1981). The decision below disregards this basic distinction.

a. The plain language of the Immigration and Nationality Act establishes that the admissibility of an alien into this country is an issue that may be resolved only in exclusion proceedings. Section 235 of the Act provides for the inspection at United States ports of entry of "*all* [arriving] aliens," including those aliens "seeking admission *or readmission* to or the privilege of passing through" this country. 8 U.S.C. 1225(a) (emphasis added). Every alien who, upon inspection, does not appear to the immigration authorities "to be clearly and beyond a doubt entitled to land" is subject to detention pending an exclusion hearing before a "special inquiry officer," or immigration judge. 8 U.S.C. 1225(b). Under Section 236 of the Act, the decision of the immigration judge concerning whether the alien "shall be allowed to enter or shall be excluded and deported" must rest solely on the evidence adduced at the exclusion hearing. 8 U.S.C. 1226(a). Moreover, the statute explicitly provides that "[p]roceedings before a special inquiry officer under this section * * * *shall be the sole and exclusive procedure for determining admissibility of a person to the United States* * * *." 8 U.S.C. 1226(a) (emphasis added).

This unambiguous statutory language reflects Congress' intent to subject to exclusion proceedings *all* aliens who are stopped at the border and are believed to be excludable, regardless of whether they are coming into this country for the first time or are applying for readmission. In contrast to the exclusion provisions of the Act, which apply to aliens at the threshold of entry, the sections of the Act that deal with deportation consistently refer to aliens "in" or "within" the United States. See 8 U.S.C. 1251(a),

(f), 1253(a). The structure of the Act—providing for exclusion at the border of all excludable aliens and for deportation of aliens who have already entered the United States—shows that Congress intended the question of an alien's admissibility to be determined in exclusion, not in deportation, proceedings.[7]

The legislative history of the Act leaves no room for doubt on this point. In identical language, the reports of the Senate and House committees state:

> The special inquiry officer is empowered to determine whether an alien detained for further inquiry shall be excluded and deported or shall be allowed to enter after he has given the alien a hearing. *The procedure established in the bill is made the sole and exclusive procedure for determining the admissibility of a person to the United States.*

S. Rep. No. 1137, *supra*, at 29; H.R. Rep. No. 1365, *supra*, at 56. (Emphasis added) Thus, contrary to the decision below, there was nothing "circular[]" (App. A, *infra*, 3a) about the Service's practice in this case of determining the issues of respondent's entry and excludability in exclusion proceedings, nor was the Service at-

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[7] The decision below stands the statute on its head by holding (App. A, *infra*, 7a) that respondent is not subject to exclusion but may be deported pursuant to 8 U.S.C. 1251 (a)(1) if the Service succeeds in showing, at a deportation hearing, that respondent made an entry and was excludable at the time of the entry. Thus, under the decision of the court of appeals, even though an immigration inspector has concluded that a resident alien is probably excludable, the alien must be admitted into the United States and then given a deportation proceeding to determine whether the alien was excludable in the first place. This roundabout procedure is inconsistent with the statutory scheme.

tempting "to use exclusion proceedings to circumvent the deportation proceeding requirements" (*id.* at 5a-6a). Rather, the Service was merely complying with the procedures mandated by Congress.

b. The decision of the court of appeals is inconsistent with the decisions of this Court, which confirm that Congress intended the admissibility of permanent resident aliens to be determined in exclusion proceedings. Thus, in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 213 (1953), the Court observed that "[f]or purposes of the immigration laws, * * * the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws."

Similarly, in *Rosenberg* v. *Fleuti*, *supra*, the Court assumed that resident aliens such as Fleuti were subject to exclusion proceedings, observing that "Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it * * *." 374 U.S. at 461. The Court in *Fleuti* interpreted the intent exception to the definition of "entry" in 8 U.S.C. 1101 (a)(13) "as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence" (374 U.S. at 462), and it noted that a resident alien returning from an innocent, casual and brief trip abroad may not have intended his trip to be "meaningfully interruptive" of his resident alien status (*id.* at 461). In such a situation, the Court concluded, a resident alien may not be regarded as making an "entry" upon his return to this country.

In support of this conclusion, the Court expressed the view that Congress did not intend a lawful resident alien who has stepped across the border and, in effect, stepped right back to be subjected "to exclusion for a condition for which he could not have been deported had he remained in the country * * *." *Id.* at 460. However, the Court was careful to point out that "if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful" (*id.* at 462), so that the alien would be making an "entry" on his return and would be subject to exclusion at the border.[8]

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[8] The court of appeals' reliance (App. A, *infra*, 5a-6a) on *Maldonado-Sandoval* v. *INS*, 518 F.2d 278 (9th Cir. 1975), is misplaced. In that case, a permanent resident alien challenged his exclusion order on the ground that his return to the United States following a brief trip to Mexico did not constitute an "entry." Based on the evidence at the exclusion proceeding, the court of appeals found that the alien's innocent, casual and brief visit abroad was not "meaningfully interruptive" of his permanent residence and that therefore the exclusion order could not stand (*id.* at 281; see also, *e.g.*, *Zimmerman* v. *Lehmann*, 339 F.2d 948, 947-949 (7th Cir.), cert. denied, 381 U.S. 925 (1965)). The court stated (518 F.2d at 281; emphasis added) that "[w]hen evidence appears, *during an exclusion proceeding*, that the alien has been theretofore granted residence status and is seeking to return to the United States after a brief visit outside the United States, the exclusion proceeding shall be terminated." In other words, the court held that if the evidence at an exclusion hearing establishes that an alien has made a *Fleuti*-type departure, then the hearing must be terminated; the court did not hold that the Service is precluded from instituting exclusion proceedings whenever the alien raises a *Fleuti* claim. See *Matter of Leal*, 15 I. & N. Dec. 477, 478-479 (1975). As

Nothing in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), or *Kwong Hai Chew* v. *Rogers*, *supra*, supports the proposition, endorsed by the court below, that "even if a permanent resident alien does make an 'entry' after a brief visit abroad, he still cannot be subject to exclusion proceedings" (App. A, *infra*, 4a). In *Colding*, this Court held that a lawful permanent resident alien who travelled abroad as a seaman on a vessel of American registry had a constitutional right to due process "without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien." 344 U.S. at 600; see also *id.* at 601. The Court in *Colding* interpreted the administrative regulations authorizing exclusion without a hearing in certain security cases to be inapplicable to those aliens who are entitled to the protections of due process. Such aliens, the Court concluded, must be given notice of the charges against them and an opportunity to be heard in opposition before their permanent exclusion and consequent deportation may be ordered. See *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 460 (describing the decision in *Colding* as establishing that a "returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to *exclude* him") (emphasis added); *Shaughnessy* v. *Mezei*, *supra*, 345 U.S. at 213 (*Colding* held that "under some circumstances temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard").

Judge Wallace noted below in dissent (App. A, *infra*, 10a), this case is clearly distinguishable from *Maldonado-Sandoval* because the evidence at the exclusion proceeding showed that respondent's trip was not innocent, casual and brief, but was intended to accomplish a purpose contrary to the immigration laws.

In *Rogers*, the court of appeals held that a resident alien may not be deprived of his status unless he has been afforded "proceedings in which the Service is the moving party, and bears the burden of proof." 257 F.2d at 606. Thus, *Colding* and *Rogers* simply hold that a permanent resident alien is entitled as a matter of due process to certain procedural safeguards before he may be excluded; those cases provide no basis for concluding that a lawful resident alien may not be subject to exclusion proceedings so long as the exclusion proceedings comport with due process requirements.

2. The decision of the court below was premised on the erroneous belief that exclusion proceedings do not afford resident aliens the due process protections of "a hearing at which the government [is] the moving party and ha[s] the burden of proof" (App. A, *infra*, 5a). It is true that Section 291 of the Act, 8 U.S.C. 1361, generally provides that the burden of proving admissibility is on the alien applying for admission. However, following the decision in *Rogers*, the Board of Immigration Appeals has held, in a series of cases, that where an alien has a colorable claim to lawful permanent resident status at the time he attempts to enter, he is entitled to a hearing at which the government bears the burden of proof. See, *e.g.*, *Matter of Becerra-Miranda*, 12 I. & N. Dec. 358, 366 (1967); *Matter of Kane*, 15 I. & N. Dec. 258, 264 (1975); *Matter of Sosa*, 15 I. & N. Dec. 572, 573 (1976); *Matter of Salazar*, Interim Decision No. 2741 (BIA Nov. 9, 1979), slip op. 3-4. See also 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, *supra*, ¶ 3.18, at 3-181 & n.18. Thus, contrary to the impression of the court below, resident aliens in exclusion hearings do receive the due process protections mandated by *Rogers*. In the present case, the decision of the immigration judge plainly indi-

cates that the mandate of *Rogers* was followed. The judge found that the Service had established respondent's excludability "by evidence that is clear, convincing and unequivocal" (App. E, *infra*, 29a), the same standard that is applied in deportation cases. See *Woodby* v. *INS*, 385 U.S. 276 (1966).

Moreover, as the record of this case demonstrates, aliens in exclusion proceedings are afforded numerous other procedural protections (similar to those available in deportation proceedings). Thus, in accordance with the regulations in effect at the time of respondent's hearing (8 C.F.R. 236.2(a) (1975)), respondent was notified of the nature and purpose of the hearing, of the right to be represented by counsel, and of the opportunity to examine and object to evidence against her, to cross-examine witnesses and to present evidence on her own behalf (R. 83-84).* In addition, at the conclusion of the hearing, the immigration judge issued a decision (App. E, *infra*, 27a-30a) setting forth a discussion of the evidence and his findings as to excludability See 8 C.F.R. 236.2 (1975); 8 C.F.R. 236.5(a). Finally, respondent was advised of her right to take an administrative appeal (R. 114), and she availed herself of that right.

Thus, insofar as aliens with colorable claims to permanent resident status are concerned, the procedural protections available at exclusion hearings are similar in most significant respects to those available at deportation hearings. See 8 C.F.R. Part

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* Since the date of respondent's hearing, the Service's regulations have been amended to provide that the immigration judge at an exclusion hearing must advise the alien of the availability of qualified free legal services programs. 8 C.F.R. 236.2(a). See 44 Fed. Reg. 4651-4655 (1979).

242.[10] The court of appeals therefore erred in concluding that the Service attempted "to use exclusion proceedings to circumvent the deportation proceeding requirements" (App. A, *infra*, 5a-6a). In any event, even if the protections available to permanent resident aliens in exclusion proceedings do not comport with due process, the court below should have required the Service to provide the necessary procedural safeguards in exclusion proceedings, as the courts did in *Colding* and *Rogers*, rather than dis-

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[10] To be sure, the protections available at exclusion and deportation hearings are not identical. For example, although in both types of proceedings the alien is entitled to notice of the charge against him (compare 8 C.F.R. 235.6(a), 236.2(a) with 8 C.F.R. 242.1(b)), the Board of Immigration Appeals has held that an alien may be found excludable in exclusion proceedings on a ground not specified in the prehearing notice of charges "as long as the applicant is informed of the issues confronting him at some point in the hearing, and he is given a reasonable opportunity to meet them." *Matter of Salazar*, *supra*, slip op. 3. Furthermore, while the burden of proof is on the Service rather than on the permanent resident alien in both exclusion and deportation proceedings, in exclusion hearings the alien must initially come forward with evidence establishing a colorable claim to permanent resident status before the Service may be required to bear the burden of establishing the alien's excludability (see page 14, *supra*), whereas at a deportation proceeding the alien may simply stand mute and put the Service to its proof. The reason for requiring the alien to present a colorable claim of permanent residence in the exclusion context is obvious, since the constitutional requirement of due process does not extend to an alien who is on the threshold of initial entry into the United States. With regard to such an alien, "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Shaughnessy* v. *Mezei*, *supra*, 345 U.S. at 212, quoting *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950).

regard the unequivocal language of the Act by requiring the Service to proceed against excludable aliens only in deportation hearings.

3. The practical effects of the decision below are substantial, particularly in light of the large proportion of immigration cases adjudicated in the Ninth Circuit. Under the court of appeals' reasoning, no excludable permanent resident aliens would be subject to exclusion proceedings, regardless of whether they are making an "entry" (see App. A, *infra*, 4a).[11] The decision would thus require the Service to admit every alien with a claim to lawful permanent resident status, notwithstanding the determination by the immigration inspector pursuant to 8 U.S.C. 1225(b) that the alien is probably excludable for engaging in such violations as smuggling drugs or

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[11] The court of appeals purported to limit its decision to situations in which a permanent resident alien returning from a visit abroad claims that the visit was not "meaningfully interruptive" of his permanent residence under *Rosenberg* v. *Fleuti*, *supra* (App. A, *infra*, 6a-7a). But when viewed in the factual context of this case, the court's purported limitation is meaningless. In *Fleuti*, the Court stated that if the purpose of an alien's departure from the United States was to accomplish an object "contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." 374 U.S. at 462. If respondent, who was apprehended while attempting to smuggle aliens into this country, could avoid being placed in exclusion hearings simply by claiming that her departure was not meaningfully interruptive, despite the fact that the purpose of her trip abroad unquestionably was to violate the immigration laws, then it would appear that any excludable permanent resident alien who is stopped at the border could similarly insist on a "right" to deportation proceedings, regardless of whether he was making an "entry."

aliens.[12] Once such aliens are admitted into this country, they will have an opportunity to abscond prior to deportation proceedings. In those cases where the Service may have a basis for believing that the alien is not likely to appear at the deportation hearing, the Service will have to expend resources in providing for a bond or detention (8 U.S.C. 1252(a)).[13]

Another consequence of the decision below would be that resident aliens who are found to have been excludable at the time of entry could nevertheless seek one or more of the numerous forms of substantive relief that Congress has made available in the deportation context but has chosen to withhold in the exclusion context. Among the privileges available under the deportation provisions of the Act are designation of the country of deportation (8 U.S.C. 1253(a)); withholding of deportation (8 U.S.C. 1253(h)); suspension of deportation or voluntary departure (8 U.S.C. 1254(a)(1), (e)); and adjustment of status (8 U.S.C. 1255). See *Maldonado-Sandoval* v. *INS*, 518 F.2d 278, 280 n.3 (9th Cir. 1975). The availability of these forms of discretionary relief will require the expenditure of substantial additional resources and will inevitably result in delays in an ad-

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[12] Under 8 U.S.C. 1182(d)(5), it is not possible for the Service to parole an alien into the United States (in contrast to admitting the alien, as required by the court below) and then place the alien in deportation proceedings.

[13] If, on the other hand, an alien coming from an adjacent country were subject to exclusion proceedings, the Service could simply advise him to return to that country and reappear at the border station on the date of the exclusion hearing. See 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, *supra*, ¶ 3.17b, at 3-170.

ministrative system that is already overburdened. In addition, requests for this relief, and appeals from the denial of relief, will provide excludable aliens with the means to extend further their unlawful stay in this country.

In *INS* v. *Wang*, *supra*, this Court held that the Ninth Circuit had "improvidently encroached on the authority which the [Immigration] Act confers on the Attorney General and his delegates" (slip op. 5). The instant case does not involve a mere failure to defer to the Attorney General's interpretation of the Act. Here, despite the absence of any constitutional basis for its decision, the court of appeals has ignored the statutory scheme established by Congress and replaced it with a different scheme that it found preferable. This the court was not empowered to do. See *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981), slip op. 13; *Potomac Electric Power Co.* v. *Director, OWCP*, No. 79-816 (Dec. 15, 1980), slip op. 15; *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JULY 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 78-2641

MARIA ANTONIETA PLASENCIA, PETITIONER-APPELLEE

v.

JOSEPH SURECK, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT-APPELLANT

Argued and Submitted May 5, 1980

Decided Nov. 7, 1980

Appeal from the United States District Court for the Central District of California

Before WALLACE and SCHROEDER, Circuit Judges and CORDOVA *, District Judge.

SCHROEDER, Circuit Judge:

In this appeal we must decide whether the Immigration & Naturalization Service (INS) may determine, at the border, in summary exclusion proceedings, whether a lawfully admitted permanent alien may return to the United States after a brief visit abroad. The district court held that the INS could proceed against such an alien only in deportation proceedings. We agree and affirm.

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* Honorable Valdemar A. Cordova, United States District Judge for the District of Arizona, sitting by designation.

Appellant, María Plasencia, is a citizen of El Salvador and since 1970 has been a permanent resident alien in the United States. In 1975, returning from a brief visit to Mexico, she was arrested at the border and charged with attempting to smuggle six aliens into the country. She declined to obtain counsel. The next day exclusion proceedings were commenced at the border and she was ordered excluded from the United States pursuant to INA § 212(a)(31), 8 U.S.C. § 1182(a)(31), which makes the smuggling of aliens for gain an excludable offense. In those proceedings Plasencia had the burden of proving that she was entitled to enter the country. INA § 291, 8 U.S.C. § 1361. The Immigration Judge regarded it appropriate in the exclusion proceedings to determine whether Plasencia's visit to Mexico was "a meaningful departure from the United States within the meaning of *Rosenberg* v. *Fleuti*," 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963). He found that she was guilty of smuggling aliens and that she was subject to exclusion proceedings.

After unsuccessfully seeking review within the INS, Plasencia brought a habeas corpus action in district court. The district court vacated the decision of the Board of Immigration Appeals affirming the order of exclusion and remanded the action to the INS with instructions to proceed against Plasencia, if at all, only in deportation proceedings.

The distinction between exclusion proceedings and deportation proceedings is central to our immigration law. Aliens seeking to enter the United States must establish their admissibility in exclusion proceedings, generally held at the border or port of entry. Those aliens already in the United States may be expelled only when the Service can carry its burden in deportation proceedings that the alien is deportable.

Deportation proceedings are generally held near the alien's home and are subject to much more stringent procedural safeguards than exclusion proceedings. *See Maldonado-Sandoval* v. *INS*, 518 F.2d 278, 280 n.3 (9th Cir. 1975).

An alien is excludable only if his coming into the United States is an "entry" as that term is defined in INA § 101(a)(13), 8 U.S.C. § 1101(a)(13). *Maldonado-Sandoval* v. *INS*, *supra*, at 280. If the alien is a permanent resident who is returning to the United States after a journey abroad, the Supreme Court has held that the return amounts to an "entry" only if the trip was "meaningfully interruptive" of his residence in America. *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462, 83 S.Ct. at 1812, 10 L.Ed.2d at 1008. The Court listed several factors which are relevant to whether a given departure is a meaningful interruption, including the length of the absence, the purpose of the trip, and whether the alien had to obtain special travel documents. The Court also said that "if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." *Id.*

The Service relies on *Fleuti* to argue, with some circularity, that since the Immigration Judge found that Plasencia was attempting to smuggle aliens for gain, and since this is an "object which is itself contrary to some policy reflected in our immigration laws," she made an "entry" in 1975 and is therefore subject to exclusion proceedings. This misconstrues *Fleuti*. The issue here is whether Plasencia was entitled to have her violation of the immigration laws and the purpose of her trip determined

in deportation rather than exclusion proceedings. That issue was not presented in *Fleuti*.

Fleuti was a deportation case. The issue was whether the alien, who had been admitted to permanent residence in 1952, had made an "entry" in 1956 when he returned from a brief visit abroad. If he had, then he was arguably deportable under INA § 241(a)(1), 8 U.S.C. § 1251(a)(1), as excludable at the time of his 1956 "entry." The Court held that he had not made an "entry" and, hence, was not deportable on that ground.[1]

The Court neither held nor implied that the question of Fleuti's "entry" in 1956 could have been decided in exclusion proceedings. In fact, an earlier case, cited with approval in *Fleuti*, strongly supports the view that even if a permanent resident alien does make an "entry" after a brief visit abroad, he still cannot be subject to exclusion proceedings.

In *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953), a permanent resident alien left the United States for four months to work on a ship. On his return he was excluded under a regulation which permitted exclusion without a hearing under certain circumstances. The Court found it unnecessary to decide whether the alien had made an "entry" or whether his journey abroad could have any effect on his ultimate right to remain in the United States. It reversed on the ground that he could not be excluded without the procedural due

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[1] INA § 241(a)(1), 8 U.S.C. § 1251(a)(1) provides:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. . . .

process to which he would have been entitled had he never left the country. On remand the District of Columbia Circuit held that this meant that he was at least entitled to a hearing at which the government was the moving party and had the burden of proof, requirements which are not satisfied by exclusion proceedings. *Kwong Hai Chew* v. *Rogers*, 257 F.2d 606 (D.C. Cir. 1958).

This Circuit's decision in *Maldonado-Sandoval* v. *INS*, *supra*, stands for the same principle established in *Kwong Hai Chew*: a permanent resident alien does not lose the procedural protection to which he is otherwise entitled simply by making a brief journey abroad. We held in *Maldonado-Sandoval* v. *INS*, *supra*, that a permanent resident alien returning from a brief trip to Mexico was not subject to exclusion proceedings:

> When evidence appears, during an exclusion proceeding, that the alien has been theretofore granted resident status and is seeking to return to the United States after a brief visit outside the United States, the exclusion proceeding shall be terminated.

518 F.2d at 281.

In *Maldonado-Sandoval* v. *INS*, *supra*, the disputed factual question was whether the alien had obtained his original visa by fraud. The Service argues that *Maldonado-Sandoval* should be distinguished because here the alien was unquestionably admitted on the basis of a valid visa but may have violated the immigration laws during the absence. No such distinction was made in *Kwong Hai Chew*. Important to our decision in *Maldonado-Sandoval* was the manifest unfairness of permitting the Service to use exclusion proceedings to circumvent the deportation pro-

ceeding requirements simply because the alien made a brief journey out of the country. *Maldonado-Sandoval* v. *INS*, *supra*, at 280 & n.3. The same unfairness is present in this case and the result should also be the same.

Finally, the Service argues that *Palatian* v. *INS*, 502 F.2d 1091 (9th Cir. 1974), permits the Service to decide the question of "entry" of a returning permanent resident in exclusion proceedings. *Palatian* was unlike this case. There the alien returned from a brief trip to Mexico with fifty-five pounds of marijuana. He was then prosecuted and sentenced for importing the drug. It was only after the alien had been prosecuted for the marijuana smuggling and had served most of his sentence that exclusion proceedings were commenced. Whether Palatian had smuggled marijuana had been fully litigated in a criminal proceeding in which he enjoyed the full panoply of procedural rights. Unlike Plasencia, Palatian was not prejudiced by exclusion rather than deportation proceedings, and, in fact, he did not ever complain of the Service's use of exclusion proceedings. The issue in the case was simply whether, as a matter of law the undisputed smuggling was or was not an "entry" within the meaning of *Fleuti*. *Palatian*, therefore, does not control this case where the disputed factual basis for the alien's exclusion was improperly litigated in exclusion proceedings and where the prejudice to the alien in being denied the procedural safeguards of deportation proceedings is manifest.

The Service should not be unduly burdened by our holding today. Our decision applies only to cases in which a permanent resident alien is returning from a visit abroad and the question is whether the visit

was "meaningfully interruptive" of the alien's American residence. In such cases the issues of "entry" and excludability must be litigated in deportation proceedings. If the Service can carry its burden of showing that the alien made an "entry" and was excludable at the time of the "entry," then, of course, the alien is deportable pursuant to INA § 241(a)(1), 8 U.S.C. § 1251(a)(1). Indeed, the Service has used deportation procedures in such "entry" cases. *E.g.*, *Fleuti* v. *Rosenberg*, *supra*; *Martin-Mendoza* v. *INS*, 499 F.2d 918 (9th Cir. 1974), *cert denied*, 419 U.S. 1113, 95 S.Ct. 789, 42 L.Ed.2d 810 (1975). We simply hold that they are mandatory.

Affirmed.

WALLACE, Circuit Judge, dissenting:

Although I am sympathetic with Plasencia's plight, the cases that bind us require me to dissent. The law simply does not provide for the full panoply of procedural rights which the majority concludes are required.

If Plasencia "entered" the United States with an intent to accomplish an object which is contrary to some policy in the immigration laws, the district court must be reversed. The Supreme Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed. 2d 1000 (1963), held that a resident alien, who has left our country, does not "enter" the United States if he or she did not intend "to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Id.* at 462, 83 S.Ct. at 1812. The Court stated that one factor relevant to the determination of that intent "is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself

contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." *Id.*

Thus, the focus of our attention is whether Plasencia's purpose in leaving the United States was to do something in violation of our immigration laws. She was found to have done so. The majority contends that such a finding can be made only in a deportation proceeding. This conclusion can be reached only by a misreading of the case that is most directly in point, *Palatian* v. *INS*, 502 F.2d 1091 (9th Cir. 1974). The majority states that *Palatian* was unlike the instant case because the alien in *Palatian* had been excluded after his conviction for importing marijuana. He had, therefore, received a full criminal proceeding "in which he enjoyed the full panoply of procedural rights." In *Palatian*, however, we were not concerned with whether the defendant's criminal trial had afforded him adequate procedural safeguards. Rather, we were concerned with whether there had been a "meaningful interruption" as required by the Supreme Court in *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462, 83 S.Ct. at 1812. *Palatian* focused on the language in *Fleuti*, quoted above, to find that a meaningful interruption of Palatian's residence had occurred. We further stated:

> What Palatian did when he attempted to come back to this country from Mexico was an "[attempt] to accomplish some object which is itself contrary to some policy reflected in our immigration laws." These laws provide for the exclusion or deportation of an alien who has been convicted of smuggling marijuana. 8 U.S.C. § 1182(a)(23), 8 U.S.C. § 1251(a)(11). This is a clear

> indication that the immigration laws reflect a general concern over the problem of drug control.

502 F.2d at 1093.

The majority goes astray by attempting to distinguish *Palatian* on the basis that there was no full trial provided to Plasencia as was provided to Palatian. The majority overlooks the difference between the statutes involved in the two cases. The statute in *Palatian* was 8 U.S.C. § 1182(a)(23), which provides for the exclusion of "[a]ny alien who has been *convicted* of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana . . ." (emphasis added). Pursuant to this statute, we found that Palatian had an intent to accomplish an objective which was contrary to a policy reflected in the immigration laws, and therefore, even if Palatian formed this intent after departing from the United States, a "meaningful interruption" of his residence had occurred. The statute under which Palatian was excluded, however, required a conviction. 502 F.2d at 1093.

In contrast, the statute in the instant case is 8 U.S.C. § 1182(a)(31), which provides for the exclusion of "[a]ny alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of the law." This statute simply does not require a conviction for exclusion, as does the drug possession statute. 1 Gordon & Rosenfield, Immigration Law and Procedure § 2.46 (1980). When Plasencia returned to this

country, she attempted to accomplish an object that was contrary to a policy reflected in our immigration laws. By statute, no conviction was required. Therefore, like Palatian, a "meaningful interruption" of Plasencia's residence had occurred.

The majority relies on *Maldonado-Sandoval* v. *INS*, 518 F.2d 278 (9th Cir. 1975) (per curiam), for the proposition that a permanent resident alien does not lose the procedural protection to which he or she is otherwise entitled simply by making a brief journey abroad. That case, however, is distinguishable from *Palatian* and the instant case because the alien in *Maldonado-Sandoval* was not engaged in any illegal activity when he attempted to reenter the United States. In *Maldonado-Sandoval*, we held that the resident alien's two or three day trip to Mexico was an " 'innocent, casual, and brief excursion,' " and "did not manifest 'an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence.' " *Id.* at 281, *quoting Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462, 83 S.Ct. at 1812. In *Palatian* and in the instant case, on the other hand, there was no "innocent, casual, and brief excursion." The excursions in both cases were for illegal purposes, and were meaningfully interruptive of the aliens' permanent residences.

Congress has made a determination that certain procedural safeguards that are necessary prior to the exclusion of an alien based upon drug smuggling are not necessary prior to the exclusion of an alien based upon smuggling of illegal aliens. The former requires a criminal conviction; the latter does not. Even though the statutes provide for a seemingly disparate treatment, "Congress unquestionably has the power to exclude all classes of undesirable aliens from this

country, and the courts are charged with enforcing such exclusion when Congress has directed it . . . ." *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 461, 83 S.Ct. at 1811. We do not have the right or power to interpolate procedural requirements from one statute to another. Plasencia's attempt to smuggle illegal aliens across the border made her departure from the United States meaningfully interruptive of her permanent residence. She was thus subject to exclusion on her attempt to enter the country. I conclude that the district court's holding that the Immigration and Naturalization Service could proceed against such an alien only in a deportation proceeding is incorrect, and, therefore, I would reverse.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 76-0889-RF(K)

MARIA ANTONIETA PLASENCIA, PETITIONER

v.

JOSEPH SURECK, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

FINAL REPORT AND RECOMMENDATION

The Proposed Report and Recommendation and Order were mailed to the parties on October 18, 1977. Defendant filed objections on November 7, 1977.

Defendant quarrels with the Magistrate's interpretation of *Palatian* v. *Immigration and Naturalization Service*, 502 F.2d 1091 (9th Cir. 1974) and *Maldonado-Sandoval* v. *Immigration and Naturalization Service*, 518 F.2d 278 (9th Cir. 1975). He cites *Cuevas-Cuevas* v. *Immigration and Naturalization Service*, 523 F.2d 883 (9th Cir. 1975), to point out that the *Palatian* court relied exclusively on the smuggling offense in finding that the rule of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963) did not apply. The Magistrate agrees and this is what distinguishes *Palatian* from the instant case. In *Palatian* and *Cuevas*, there was a separate proceeding in which a conviction of the offense leading to exclusion or deportation was obtained. Palatian had a trial in federal court. Cuevas entered a plea of guilty to a violation of 8 U.S.C. § 1325 and then had a deporta-

tion proceeding before an Immigration Judge who found him deportable.

Maldonado-Sandoval stands for the proposition that when evidence appears during an exclusion proceeding that an alien has been previously granted residence status and is seeking to return to the United States after a brief visit, exclusion proceedings shall be terminated. If there is also evidence that the alien may have committed an excludable or deportable offense, the INS can therefore institute deportation proceedings against him. The Court lays stress upon the procedural safeguards inherent in a deportation proceeding which are not present in an exclusion proceeding. It stands for the proposition that when the question of "entry" is determined by a finding as to the commission of an underlying offense in the same proceeding it is not to be litigated in an exclusion proceeding when the subject is an alien who has been previously granted residence status.

Finally, respondent points out that since petitioner had been a resident of the United States in excess of five years prior to her "departure," the subject of this proceeding, she would not be deportable under 8 U.S.C. § 1251(a). Respondent mistakes the Magistrate's findings and recommendation. The Magistrate found that a meaningful departure did not occur in the instant case "based upon the evidence presented at the exclusion hearing." (Report and Recommendation, p. 8, lines 16-18). On remand, the Immigration and Naturalization Service would not be prevented in a deportation hearing from attempting to show that petitioner in fact did make an "entry" which would of course start the five year period running anew. The findings of the exclusion hearing are not res judicata.

The Magistrate therefore recommends that his Proposed Report and Recommendation be considered final and that the accompanying Proposed Separate Judgment and Order be signed.

DATED: This 6th day of December, 1977.

/s/ John R. Kronenberg
JOHN R. KRONENBERG
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 76-0889-RF(K)

MARIA ANTONIETA PLASENCIA, PETITIONER

v.

JOSEPH SURECK, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

REPORT AND RECOMMENDATION ON A PETITION FOR WRIT OF HABEAS CORPUS BY AN ALIEN DETAINED BY THE IMMIGRATION AND NATURALIZATION SERVICE

This Report and Recommendation is submitted to the Honorable Robert Firth, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1) and General Order 104-D of the United States District Court for the Central District of California.

On March 18, 1976, petitioner with counsel filed this Petition for a Writ of Habeas Corpus alleging unlawful restraint by the District Director of the Immigration and Naturalization Service at Los Angeles, California.

No temporary restraining order was sought as petitioner is currently paroled by the District Director without bond.

The Magistrate issued an order to show cause and after one continuance the matter was argued and submitted on May 7, 1976. Respondent filed a Re-

turn in opposition and a copy of the certified administrative record on April 28, 1976.

The Magistrate has examined the pleadings and exhibits submitted as well as the administrative record and makes the following findings and conclusions.

Petitioner seeks termination of an expulsion proceeding against her and asks that she be restored to lawful permanent resident status. Further, if this Court finds petitioner excludable, she asks that she be excluded to the United States[,] "her place of abode." In the alternative, petitioner asks that this Court remand the matter for the purpose of allowing a de novo determination of her case in a deportation proceeding.

Petitioner is a permanent resident alien married to a United States citizen having entered the United States on March 6, 1970. On June 27, 1975, she went from Los Angeles to Tijuana in the company of her husband. She was apprehended on June 29, 1975 when she and her husband and approximately six non-resident aliens applied for admission at the port of entry at San Ysidro, California. She was detained and an exclusion hearing was held on June 30, 1975. Petitioner appeared without counsel and testified together with her husband. Evidence including testimony of some of the alien passengers was admitted against her (Tr. pp. 26-58).

Prior to the hearing, petitioner waived her right to counsel.

After the hearing, the Immigration judge rendered a decision indicating that petitioner made a meaningful departure from the United States and consequently was subject to the exclusionary provisions of the law. It was further found that she was engaged in conduct in Mexico in violation of the immigration laws and under these circumstances her departure

was not in essence casual or brief. She was found to have knowing[ly] and for gain, aided other aliens to enter or to try to enter the United States in violation of 8 U.S.C. § 1182(a)(31). It was ordered that she be excluded and deported from the United States (Tr. pp. 16-19).

The decision of the Immigration judge was affirmed on appeal (Tr. p. 13). An application for reopening of the exclusion proceedings was denied (Tr. pp. 1-2). Petitioner has exhausted her administrative remedies.

In an exclusion case, the scope of this court's review is to determine whether the alien had a fair hearing, or whether the decision finding the alien excludable is arbitrary and capricious and constitutes an abuse of discretion. *Licea-Gomez* v. *Pilliard*, 493 F.Supp. 577 (N.D. Ill. 1980). An abuse of discretion includes a decision which although supported by the evidence is a result of a misunderstanding of the law. *Loza-Bedoya* v. *Immigration and Naturalization Service*, 410 F.2d 343 (9th Cir. 1969).

Petitioner argues that she was not making an entry into the United States which would subject her to the exclusionary laws because she had not made a departure meaningfully disterruptive of her personal residence in this country.

It is further argued that petitioner did not bring the ineligible aliens to the border with the intent to smuggle them across for "gain" as proscribed by 8 U.S.C. § 1182(a)(31).

The question of "entry" is dispositive. If a finding of no "entry" is made, the exclusionary proceedings must terminate and the Immigration and Naturalization Service may institute deportation proceedings if it wishes. The difference between exclusion and

deportation proceedings is substantial. A decision on this issue will grant petitioner more than token relief. *Maldonado-Sandoval* v. *Immigration and Naturalization Service*, 518 F.2d 278 (9th Cir. 1975).

A reading of the "entry" cases decided in this circuit indicate an inclination on the part of the Appellate Courts to consider all of the equities of the situation in cases such as this. *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963); *Munoz-Casarez* v. *Immigration and Naturalization Service*, 511 F.2d 947 (9th Cir. 1975); *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758 (9th Cir. 1972); *Toon-Ming Wong* v. *Immigration and Naturalization Service*, 363 F.2d 234 (9th Cir. 1966) and *Wadman* v. *Immigration and Naturalization Service*, 329 F.2d 812 (9th Cir. 1964).

The leading case, *Fleuti*, *supra*, establishes three criteria to be considered in determining in accord with Congressional intent if a meaningful interruption of an alien's permanent residence has occurred. The major factor is the length of time the alien was absent. Another is the purpose of the visit and it is stated that ". . . if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, . . . the interruption of residence thereby occurring would properly be regarded as meaningful." A third factor is whether or not the alien has to procure any travel documents in order to make his trip. 374 U.S. at 462.

Petitioner argues that the intent to violate the immigration laws must be formed prior to leaving the United States, citing *Fleuti* where it states ". . . if the purpose of leaving . . . ." It is argued that the intent must be formed before departure.

Petitioner urges and the Magistrate agrees that there is no evidence in the instant case that peti-

tioner had an intent to violate the immigration laws when she left the country or that such intent was the purpose of her leaving.

Respondent argues that the petitioner made a meaningful departure from the United States under the rule of the *Fleuti* case, citing *Palatian* v. *Immigration and Naturalization Service*, 502 F.2d 1091 (9th Cir. 1974).

It is argued that the Ninth Circuit has rejected an interpretation of *Fleuti* which would require that the intent for an illegal purpose be formed prior to departure. This appears to be the holding in *Palatian* with regard to the facts there presented.

Palatian cites *Fleuti*, *supra*, and mentions that one of the factors that that court determined to be relevant was the purpose of the visit. It goes on to reiterate that the court considered the ". . . purpose of leaving the country . . . ." Finally, it states that "the operation of these and other possible relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion.'" 502 F.2d at 1093.

That court then shifts emphasis to the purpose for which Palatian returned to the country, admittedly, contrary to the policy of the immigration laws.

The court laid great stress on the fact that Palatian's offense was the possession of 28 bricks of marijuana weighing approximately 55 pounds and discusses the general policy of the immigration laws for the exclusion or deportation of persons convicted of smuggling marijuana. 8 U.S.C. § 1182(a)(23) and 8 U.S.C. § 1251(a)(11). It is to be noted that in the *Palatian* case, the defendant was apprehended, tried and convicted in a federal court. It was after this conviction that the Service brought the exclusion proceedings.

Maldonado-Sandoval is another case in which petitioner had been granted status as a permanent resident. Subsequent investigation by Immigration and Naturalization Service disclosed that he might have entered the United States fraudulently. He made a three day visit to Mexico on personal business which was not connected with any further violation of the law. Some six months later, an exclusion hearing was held and it was found that his visa was invalid because of fraud. The court found that procedural and substantive differences between proceedings of exclusion and deportation are significant. It further found that to deprive the petitioner of the benefit of deportation proceedings in the determination of his case would do violence to both the letter and spirit of *Fleuti*.

The Magistrate has little difficulty in accepting the rationale of *Palatian* since its facts are considerably different than those upon which the *Fleuti* decision was based. It seems to involve an extension of the *Fleuti* doctrine in a particular factual situation. It does not seem to govern the case before us at this time. The Magistrate feels that the spirit and reasoning of *Maldonado-Sandoval* is more in point.

In the instant case, the question whether or not petitioner was entitled to a deportation rather than an exclusion hearing was decided at the exclusion hearing. A determination was made at the hearing as to whether or not petitioner made an "entry" within the meaning of the statute. Thus by a bootstrapping process a decision was reached at the exclusion hearing based upon the same facts that petitioner was only entitled to an exclusion hearing and that she should be excluded. The factual decision reached at the exclusion hearing to the effect that

she had committed a crime while attempting re-entry determined the classification of her visit as well as the outcome of the hearing itself. This distinguishes the case both from *Palatian* and *Maldonado-Sandoval.*

Turning to *Fleuti,* the court specified that one criteria might be the purpose of leaving the country. The basis of the present decision of the Immigration and Naturalization Service is that the *Fleuti* doctrine as interpreted by *Palatian* does not apply. The Magistrate believes that the *Palatian* extension of *Fleuti* should not apply under the facts of the instant case.

The Magistrate therefore makes a determination that a meaningful departure did not occur in the instant case based upon the evidence presented at the exclusion hearing and that therefore petitioner is entitled to a deportation hearing under the rule of *Maldonado-Sandoval.*

IT IS THEREFORE RECOMMENDED that the Petition for a Writ of Habeas Corpus be denied and the Order of the Board of Immigration Appeals be vacated and the case remanded to the Immigration and Naturalization Service for further proceedings consistent with this Report and Recommendation.

DATED: This 29th day of September, 1977.

/s/ John R. Kronenberg
JOHN R. KRONENBERG
United States Magistrate

Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed the records and pleadings and the Report and Recommendation of the United States Magis-

trate, and concurs with and adopts his findings and conclusions.

DATED: This 21 day of March, 1978.

/s/ Robert Firth
ROBERT FIRTH
United States District Judge

APPENDIX C

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Washington, D.C. 20530

Feb. 11, 1976

File: A30 738 083—El Centro

In re: MARIA ANTONIETA PLASENCIA

IN EXCLUSION PROCEEDINGS

MOTION

ON BEHALF OF APPLICANT:

Gary H. Manulkin, Esquire
One Stop Immigration Center
1441 Wright Street
Los Angeles, CA 90015

ON BEHALF OF I&N SERVICE:

Harold Neubauer
Trial Attorney

EXCLUDABLE: Section 212(a)(31), I&N Act
(8 U.S.C. 1182(a)(31))—
Smuggling for gain

APPLICATION: Reopening of exclusion proceedings

This case presents a motion to reopen these proceedings. The motion will be denied.

The record relates to a 41-year-old married female alien, a native and citizen of El Salvador, who was

admitted to the United States for permanent residence on March 6, 1970. On or about June 27, 1975, she was arrested at San Ysidro, California, when she was detected attempting to smuggle six nonresident aliens without valid documents into the United States. She was detained pursuant to section 235(b) of the Immigration and Nationality Act to determine her admissibility under section 212(a)(31) of the Act, i.e., that she knowingly and for gain assisted aliens to enter or attempt to enter the United States in violation of law. At the exclusion hearing the applicant waived counsel (Tr. p. 1). The immigration judge concluded that the evidence of record supported finding the applicant excludable under the provisions of section 212(a)(31) of the Act, citing decisions in *Matter of P—G—*, 7 I&N Dec. 514 (BIA 1957) and *Matter of B—G—*, 8 I&N Dec. 182 (BIA 1958). The immigration judge also found that the applicant made a meaningful departure from the United States within the meaning of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963).

In his motion papers counsel challenges excludability on the ground that the applicant is not attempting an "entry" into the United States under the doctrine set forth in *Rosenberg* v. *Fleuti*, supra. The *Fleuti* doctrine, however, does not apply to an alien, such as the applicant, whose absence from the United States was for a purpose that contravened the policy reflected in the immigration laws, *Palatian* v. *INS*, 502 F.2d 1091 (9 Cir. 1974); *Martin-Mendoza* v. *INS*, 499 F.2d 918 (9 Cir. 1974); *Matter of Corral-Fragoso*, 11 I&N Dec. 478 (BIA 1966). We agree with the immigration judge's conclusion that the applicant is attempting an "entry," and that she is inadmissible to the United States under section 212(a)(31) of the Act.

In addition, counsel argues that the applicant did not intelligently waive her right to be represented by counsel. First, it is to be noted that the applicant waived her right to counsel. In response to the immigration judge's question whether she wished to be "represented by counsel or by some other qualified person," she replied in the negative (Tr. p. 1). We have carefully reviewed the evidence of record. We find the applicant was accorded due process of law at every stage of these proceedings. Moreover, due process is not denied when the applicant voluntarily waives representation by counsel as she did in this case. See *Giaimo* v. *Pederson*, 289 F.2d 483 (6 Cir. 1961); *U.S. ex rel. Dentico* v. *Esperdy*, 280 F.2d 71 (2 Cir. 1960); *U.S. ex rel. Mustafa* v. *Pederson*, 207 F.2d 112 (7 Cir. 1953).

Nothing stated in the motion papers warrants reopening of these proceedings. Accordingly, the following order will be entered.

ORDER: The motion is denied.

/s/ David L. Milhollan
Chairman

APPENDIX D

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Oct. 23, 1975

File: A30 738 083—El Centro

In re: MARIA ANTONIETA PLASENCIA

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: PRO SE

EXCLUDABLE: Section 212(a)(31), I&N Act
(8 U.S.C. 1251(a)(31))—
Smuggling for gain

APPLICATION: Admission as a returning resident

ORDER:

PER CURIAM. The decision of the immigration judge is affirmed. The appeal accordingly is dismissed.

/s/ Louisa Wilson
Acting Chairman

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No: A30 738 083—San Ysidro, California

June 30, 1975

IN THE MATTER OF
MARIA ANTONIETA PLASENCIA, APPLICANT

IN EXCLUSION PROCEEDINGS

EXCLUDABLE: Act of 1952—Section 212(a)(31)—
Smuggling for gain

APPLICATION: Admission as a returning resident

ON BEHALF OF APPLICANT: Pro Se

ON BEHALF OF SERVICE:
Harold Neubauer, Esq.
Immig. & Naturalization Service
San Diego, California 92104

ORAL DECISION OF THE
IMMIGRATION JUDGE

The applicant is a 41 year old married female alien, a native and citizen of El Salvador, who was originally admitted to the United States for permanent residence on or about March 6, 1970 (*Exhibit Number 2*).

On or about June 27, 1975, she went to Tijuana, Mexico, with her husband. When she attempted to return on June 29, 1975, approximately six nonresident aliens without valid documents to enter the United States were found with her. She was then

furnished with Form I-122, notifying her that she was being detained pursuant to Section 235(b) of the Act to determine her admissibility under Section 212(a)(31) of the Act. The charge against her is that she knowingly and for gain assisted aliens to enter or attempt to enter the United States in violation of law.

During the hearing that followed on June 30, 1975, at which time she waived counsel, the applicant and her husband testified. In addition, three nonresident aliens, Anna Elsa LOPEZ, Jose Alfredo SANTILLANA, and Luis POLIO-Medina also testified.

Although the precise details of all of the events that occurred are not certain, it is clear that on or about June 27, 1975, the applicant and her spouse travelled to Tijuana, Mexico, where she met with the two nonresident aliens, Anna Elsa LOPEZ and Luis POLIO-Medina, supra, and began making preliminary arrangements to facilitate their illegal entry into the United States. Knowing that the aliens did not have proper bordercrossing documents, the applicant furnished each of the nonresident aliens with Alien Registration receipt cards that belonged to her children. She also agreed to transport them in her automobile with her husband to Los Angeles, California. In furtherance of the scheme, the applicant and her husband and approximately six nonresident aliens applied for admission at the Port of Entry at San Ysidro, California, on June 29, 1975. The illegal scheme was detected, and the applicant was detained for the exclusion hearing which followed.

Although the applicant admits that she furnished the false documents to the nonresident aliens, she argues that she did so without personal gain or anticipated gain. She asserts the only payment involved was $25.00 she received for gasoline. This sharply

conflicts with the testimony of Anna Elsa LOPEZ who testified under oath that she had agreed with Mrs. Plasencia to pay her $250.00 after she had obtained work in this country. Mrs. Plasencia's testimony also conflicts with the testimony of Luis POLIO-Medina who said that it was understood that she was to be paid about $200.00 after they arrived in Los Angeles, California.

In this proceeding, the accounts of what actually occurred are sharply conflicting. During the hearing, I have had an opportunity to carefully observe the demeanor of the applicant, Anna Elsa LOPEZ, and Luis POLIO-Medina. It is my considered judgment that the testimony of POLIO and LOPEZ is accurate and reflects the events that actually occurred. On the other hand, Mrs. Plasencia's testimony is incredible and not worthy of belief.

Plasencia's conduct as evidenced at trial clearly falls within the construction of Section 212(a)(31) of the Act. The arrangements she made in Mexico to assist the illegal entry of the nonresident aliens, the agreement with respect to money, the furnishing of documents, their travel from the hotel directly to the Port of Entry, and the agreement to transport them to Los Angeles, taken together, establish by evidence that is clear, convincing and unequivocal that the facts alleged as grounds for exclusion are true and that the applicant did knowingly and for gain encourage, induce, assist, abet, or aid nonresident aliens Anna Elsa LOPEZ and Luis POLIO-Medina to enter or try to enter the United States in violation of law. Moreover, even if I were to find applicant's testimony credible, and I do not, it is clear that the $25.00 payment for gasoline brings her within the ambit of the statute. *Matter of P—G—*,

7 I&N Dec. 514 (BIA 1957); *Matter of B—G—*, 8 I&N Dec. 182 (BIA 1958).

Finally, I find that applicant made a meaningful departure from the United States within the meaning of *Rosenberg* v. *Fleuti*, 374 US 449 (1963) and, consequently, is subject to the exclusionary provisions of the law upon her return. She engaged in conduct in Mexico which is in violation of the immigration laws. Under these circumstances it can hardly be said that her departure was innocent, casual, and brief. *Palatian* v. *INS*, 502 F. 2d 1091 (9 Cir. 1974); *Matter of Corral-Fragoso*, 11 I&N Dec. 478 (BIA 1966). There is no discretionary relief available. Accordingly, the following order will be entered:

ORDER: IT IS ORDERED that the applicant be excluded and deported from the United States.

/s/ John C. Williams
JOHN C. WILLIAMS
Immigration Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-2641

DC CV 76-0889

MARIA ANTONIETA PLASENCIA,
PETITIONER/APPELLEE

vs.

JOSEPH SURECK, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT/APPELLANT

Appeal from the United States District Court for the Central District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 7, 1980

A TRUE COPY
ATTEST:
RICHARD H. DEANE
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-2641

MARIA ANTONIETA PLASENCIA,
PETITIONER-APPELLEE

v.

JOSEPH SURECK, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

Filed Feb. 26, 1981

ORDER

Before: WALLACE and SCHROEDER, Circuit Judges, and CORDOVA *, District Judge

A majority of the panel as constituted above has voted to deny the petition for rehearing and the panel has unanimously voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* Honorable Valdemar A. Cordova, District Judge for the District of Arizona, sitting by designation.

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 76-0889-RF(K)

MARIA ANTONIETA PLASENCIA, PETITIONER

v.

JOSEPH SURECK, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

SEPARATE JUDGMENT AND ORDER PURSUANT TO RULE 58, F.R.C.P.

IT IS ADJUDGED that the petition for writ of habeas corpus is denied.

IT IS FURTHER ORDERED that the matter be remanded to the Immigration and Naturalization Service for further proceedings in accordance with the Report and Recommendation of the United States Magistrate on file herein.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order and the Report and Recommendation of the United States Magistrate by United States mail upon the petitioner through her counsel and upon the United States Attorney for the Central District of California.

DATED: This 21 day of March, 1978.

/s/ Robert Firth
ROBERT FIRTH
United States District Judge

APPENDIX I

The Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, provides in pertinent part:

8 U.S.C. 1101

(a) As used in this chapter—

* * * * *

(3) The term "alien" means any person not a citizen or national of the United States.

* * * * *

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

8 U.S.C. 1182

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(31) Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

8 U.S.C. 1225

(a) The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General, and under such regulations as he may prescribe. Immigration officers are authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under

oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently, and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 1182 of this title. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(b) Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 1323 (d) of this title, who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

8 U.S.C. 1226

(a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in ac-

cordance with this section, the applicable provisions of sections 1225 and 1357(b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 349220 514

Joint Appendix

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

No. 81-129

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIA ANTONIETA PLASENCIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

GARY H. MANULKIN
1730 West Olympic Boulevard,
Room 407
Los Angeles, California 90015
(213) 380-2280

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PETITION FOR A WRIT OF CERTIORARI FILED JULY 21, 1981,
CERTIORARI GRANTED JANUARY 11, 1982

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
3-18-76	mn	Fld Petition for Writ of H/C re deportation. Fld Notc & ORD Of Reference pursuant to Gen. Order 104-D naming John R. Kronenberg.
4/8/76	jmr	Fld OSC (K) to respdt to appear on 4/23/76 at 9:30AM re why writ of H/C should not be iss'd.
4/22/76	jmr	Fld Stip & ORD (K) cont hrg on OSC to 5/7/76 at 9:30AM.
4/28/76	jmr	Fld respdt's RETURN & opposition to petition for writ of Habeas Corpus.
	jmr	Fld respdt's certified administrative rec re Maria Antoineta Plasencia.
5/7/76	jmr	MIN ORD: Hrg on OSC why writ of H/C should not be iss'd. Crt ORD (K) matter deem submitted.
10/18/77	mz	Fld Notc of lodgng of Mag's reprt & recmmndtn & jdgmt. LODGED prop Reprt & recmmndtn LODGED prop jdgmt.
11/7/77	mz	Fld deft-respndt's objs to Mag's reprt & recmmndtn.
3/21/78	sam	Fld Crt's ORD(K) on rept & recommendation on petn for writ of H/C. Fld Crt's final rept & recommendation & ORD(K) Fld sep Judgmt & ORD that petn for writ of H/C is denied. It is fur Ord that the matter be remanded to the INS for fur procdgs. Mld cpys & notc. (ENT 3/22/78).
5/19/78	tg	Fld respndnt's NOTICE OF APPEAL frm jdgmnt entd on 3/22/78.
5/31/78	tg	Fld respndnt's DESIGNATION OF RECORD ON APPEAL.

GARY H. MANULKIN
Attorney at Law
1800 West Sixth Street
Los Angeles, California 90057
Telephone: (213) 483-1937
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 76 889 RF(K)

[Filed Mar. 18, 1976]

MARIA ANTONIETA PLASENCIA, PETITIONER

vs.

JOSEPH SURECK, District Director of the Immigration and Naturalization Service, RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS

The petition of MARIA ANTONIETA PLASENCIA, hereinafter referred to as petitioner, respectfully shows that petitioner is unlawfully detained and restrained of her liberty by JOSEPH SURECK, District Director, Immigration and Naturalization Service, Los Angeles, California, hereinafter referred to as the respondent, pursuant to a final exclusion order. A petition for a writ of habeas corpus is the exclusive method of contesting an exclusion order. Section 106(b), Immigration and Nationality Act of 1952, 8 U.S.C. § 1105a(b), as amended by Section 5, Act of 1961, P.L. 87-301, 75 Stat. 653.

I

The petitioner is a native and citizen of El Salvador, who was originally admitted to the United States for

permanent residence on or about March 6, 1970. (See, *Oral Decision of the Immigration Judge*, p. 1). Petitioner was admitted to permanent residence because of her marriage to an American citizen, Joseph Plasencia, on March 29, 1969.

II

On or about June 27, 1975, petitioner and her husband went to Tijuana, Mexico, to inquire about the cost of dental work and car repair. (See, Transcript, hereinafter Tr., p. 5, lines 8-22). While in Mexico they met five persons at a hotel. Mr. Plasencia agreed to take the aliens across the border. When they attempted to return to the United States on June 29, 1975, they picked up a hitchhiker along the way; therefore, approximately six nonresident aliens without valid entry documents were found with the Plasencias when they were stopped at the border inspection crossing at San Ysidro, California. (See. Tr. p. 7, lines 6-7; p. 22, lines 8-14; *Oral Decision of the Immigration Judge*, p. 1)

III

On June 30, 1975, petitioner was held for an exclusion hearing, without the aid of counsel and therefore, as the Transcript points out (See. Tr. p. 16, lines 10-31), without a proper presentation of her case, before Immigration Judge John C. Williams, at San Ysidro, California. No charges were brought against her American citizen husband or any of the other aliens present in the automobile.

IV

The Immigration Judge ordered the petitioner excluded pursuant to Section 212(a)(31) of the Immigration and Nationality Act of 1952, as "any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to

try to enter the United States in violation of law." (8 U.S.C. § 1182(a)(31).

V

Petitioner submitted Form I-290A, Notice of Appeal to the Board of Immigration Appeals, on June 30, 1975. The appeal was dismissed by the Board of Immigration Appeals at Washington, D.C. before petitioner's attorney could submit a brief on her behalf; because petitioner's husband had erroneously and unknowingly stated that no brief would be submitted. Therefore, the decision was based entirely on the *Oral Decision of the Immigration Judge* and the Transcript of the exclusion hearing.

VI

Petitioner's husband demanded and was granted on September 19, 1975, a humanitarian parole by the respondent Joseph Sureck. (See attached copy of Form I-94, granting the parole until March 18, 1976). The parole was granted so that petitioner would not be separated from her husband and four children pending the appeal of the exclusion order. Petitioner's husband is without employment and would have tremendous difficulty sending petitioner enough money to survive outside the United States. (See attached affidavit as to the hardships that would befall this family if the mother would be finally separated from them).

VII

Petitioner filed a Motion to Reopen the Exclusion Hearing with the Immigration Judge and the respondent, on October 28, 1975. The hearing was requested reopened, so that petitioner's counsel could present a fair showing of the facts and adequately refute the testimony against her; which she was unable to do because of her lack of knowledge. In particular, petitioner's attorney urged that testimony be taken on the crucial issue of whether petitioner meaningfully departed the United States; thereby intending to relinquish her residency as

conceived by the rule in *Rosenberg* v. *Fleuti*, 374 U.S. 449, 10 L.Ed 2d 1000, 83 S. Ct. 1804 (1963). The motion to reopen Exclusion proceedings was denied by the Board of Immigration Appeals on February 11, 1976, in a written decision and order. (A copy of petitioner's Motion to Reopen is annexed hereto, marked Exhibit "B" and made a part hereof.)

VIII

The decision of the Immigration Judge and the Board of Immigration Appeals is clearly erroneous and without valid authority in law, in that, petitioner is not making an entry that would subject her to the exclusionary laws of the Immigration and Nationality Act, because she has not made a departure meaningfully disruptive of her permanent residency in the United States. *Rosenberg* v. *Fleuti*, *supra*. Furthermore, petitioner did not bring the aliens to the border with the intent to smuggle them across for 'gain' as conceived by Section 212(a)(31) of the Immigration and Nationality Act of 1952.

IX

By reasons of the above said premises, the petitioner has been denied a fair hearing and has been denied due process of the law, in that the Immigration Judge and the Board of Immigration Appeals have excluded her from the United States under a erroneous conclusion of law and fact; thereby, revoking petitioner's resident status without the aid of counsel and without the procedural safeguards of a deportation hearing in which she was entitled.

X

No prior petition for a writ of habeas corpus has been made in regard to the detention and restraint of liberty complained of herein.

X.

During the pendency of said exclusion proceedings and appeals the petitioner has at all times been at large without bond pursuant to a humanitarian parole granted by respondent Joseph Sureck, from September 19, 1975 to March 18, 1976. Petitioner has at all times been available to appear before the immigration authorities if called upon to do so.

WHEREFORE, The Petitioner prays:

1. That a writ of Habeas Corpus issue herein, directed to Joseph Sureck, District Director, Los Angeles California, commanding him to terminate any explusion proceeding against petitioner;
2. That the District Court make a determination of petitioner's right to be restored to a lawful permanent resident status, to remain unrestrained and undetained by the exclusion order, and to be restored to her former liberty;
3. That the District Court upon the issuance of the Order to Show Cause herein allow the petitioner to remain at liberty without bond or bail, and order the Respondent to cease and desist from initiating and pursuing any action such as arresting, harassing, deporting, holding, transporting, or detaining petitioner pending the final order of this Court determining the petitioner's status.
4. In the alternative, if this Court finds that Petitioner was properly found to be excludable, then this Court should exclude this petitioner to the country from whence she came (i.e. the United States, her place of abode).
5. In the alternative, that this Court remand for the purpose of allowing petitioner a de novo determination of her case in deportation proceedings.

6. For any other just relief that the District Judge deems necessary and proper.

Respectfully submitted,

DATED: March 17, 1976

/s/ Gary H. Manulkin
GARY H. MANULKIN
Attorney for Petitioner

Sworn and subscribed to before me
this 18th day of March, 1976

Notary Public
JANET C. KING
Notary Public—
California
Los Angeles County
My comm. expires
Nov. 9, 1978
1800 W. 6th St., L. A.,
CA 90057

STATES DEPARTMENT OF JU:
In. GRATION AND NATURALIZATION SERV E

NOTICE TO APPLICANT FOR ADMISSION DETAINED FOR HEARING BEFORE IMMIGRATION JUDGE

File: A30 738 083

To: ~~Maria Antonieta PLASENCIA~~ Date: ~~June 30, 1975~~

PLEASE TAKE NOTICE THAT:

You do not appear to me to be clearly and beyond a doubt entitled to enter the United States as you may come within the exclusion provisions of Section 212 (a) (31) of the Immigration and Nationality Act, as amended, in that you wilfully and knowingly aided and abetted the entry of illegal aliens into the United States in violation of law and for gain

Therefore you are detained under the provisions of Section 235 (b) of the Immigration and Nationality Act, as amended, for a hearing before a Immigration Judge to determine whether or not you are entitled to enter the United States or whether you shall be excluded and deported. During such hearing you will have the right to be represented by counsel and to have a friend or relative present.

AT THE HEARING BEFORE THE IMMIGRATION JUDGE YOU MUST ESTABLISH THAT YOU ARE ADMISSIBLE TO THE UNITED STATES UNDER ALL PROVISIONS OF THE UNITED STATES IMMIGRATION LAWS.

The hearing

☐ is scheduled for ~~11:00 AM~~ (Time) ~~30 June 1975~~ (Date) ~~San Ysidro, Calif.~~ (Place)

☐ will be scheduled and you will be notified as to time and place. It is understood that you want the notice of hearing to be sent to you at the following address:

(Street and Number) (Apt. No.) (City) (Province) (State) (County)

Randell H. Romine
(United States Immigration Officer)

ORDER OF S.I.O.

Excluded and Deported-Appeal Waived

JUN 30 1975 Date

S.I.O.

Balt

CERTIFICATE OF SERVICE

(Original) of this notice was delivered to the above-named applicant by the undersigned on

Randell H Romine 6-30-75
(United States Immigration Officer)

076

FILE No. A30 738 083 (Balt) IN

TRANSCRIPT OF EXCLUSION HEARING
JUNE 30, 1975

[1] OPENING:

This is John Williams conducting an exclusion hearing on June 30, 1975, at San Ysidro, California, in the matter of Maria Antonieta PLASENCIA, A30 738 083. The hearing is in Spahinsh through the official interpreter, Adeline Buckelew, and is recorded in the IBM machine. The applicant is not represented by counsel, but she is accompanied by her husband. The Government is represented by Harold Neubauer, Esq., Immigration and Naturalization Service, San Diego, California 92104.

JUDGE TO APPLICANT:

Q Mrs. Plasencia, do you understand that this is a hearing to determine if you have a legal right to return to the United States or whether you should be ordered excluded and deported?

A Yes.

Q At the hearing you may, if you wish, be represented by counsel or by some other qualified person. Do you want to be represented?

A No.

Q Inasmuch as you are representing yourself, I want you to fully understand your rights. You have a right to examine and object to evidence that is presented against you. I mean by this that you can look at and point out errors or make comments about any document I consider in arriving at a decision. If witnesses should testify against you, you have a right to question and to cross-examine witnesses. In addition, later on during the hearing, after Mr. Neubauer who represents the Immigration Service presents his evidence, you'll have an opportunity to respond and present documents and witnesses to [2] show why you should not be ordered excluded and deported. Moreover, please feel free during the hearing

to talk with your husband. Do you understand your rights?

A Yes.

Q Before we go any further, will you please stand to take an oath to testify truthfully. Do you solemnly swear that all the testimony that you give at this hearing will be the full truth so help you God?

A I swear it.

Q Please be seated. (Complies) What is your full name?

A Maria Antonieta PLASENCIA.

Q I have before me a written notice addressed to you dated today from the Immigration Service. I shall mark this written notice advising you of the hearing *Exhibit 1* and make it part of the record. Now, this document accuses you of being excludable from the United States, because the Immigration Service says that you willfully and knowingly aided and abetted the entry or attempted entry of illegal aliens into the United States in violation of law and for gain. Do you understand the charge?

A Yes.

Q I shall ask Mr. Neubauer now to present his evidence. After he does so, you'll have an opportunity to present your side of this case. Do you understand?

A Yes.

JUDGE:

Mr. Neubauer, will you please present the Government's evidence?

[3] TRIAL ATTORNEY TO APPLICANT:

Q Mrs. Plasencia, when and where were you born?

A I was born the 13th of June, 1934, in San Salvador.

Q Of what country, are you now a citizen?

A Of El Salvador, Central America.

Q Did you ever become a citizen of the United States?

A My husband was teaching me the things needed to become a citizen.

Q Were you admitted to the United States as a permanent resident?

A Yes.

Q I show you a Form I-151 and I ask if you are the person named in this document.

A Yes.

Q Is that a legal document? Did you receive an Immigrant visa to come to the United States?

A I went to Canada.

Q Did you enter the United States on or about March 6, 1970, as a permanent resident at San Francisco as shown on this document?

A Yes.

Q Have you remained a resident since that time?

A Yes.

TRIAL ATTORNEY:

I offer the Form I-151, your Honor.

JUDGE:

Mrs. Plasencia, do you have any objection to this Form I-151 which is your alien registration receipt card being made part of the record so that I may consider the document when I reach a decision?

[4] APPLICANT:

No objection.

JUDGE:

The document is marked *Exhibit 2* and made part of the record.

TRIAL ATTORNEY TO APPLICANT:

Q When did you last leave the United States to go to Mexico?

A In 1973.

Q Have you been in Mexico since 1973?

A That is an error. It was 1974.

Q Did you just recently make a trip to Mexico?

A No, I haven't been back since 1974.

Q I understand that you came to this Port on Friday for the purpose of entering the United States. Is that correct?

A Yes, I came with my husband. I wanted a dentist to see my teeth.

Q Was that your first trip back to the United States since 1974?

A Yes, that's true. I haven't been back.

Q What month in 1974 did you leave the United States?

A I don't remember; I'm sorry.

Q Was it in the beginning of the year, or towards the end of 1974?

A I believe that it was at the beginning, but I don't remember.

Q Can you state definitely whether you have been out of the country continuously for one whole year?

A No, never. For fifteen days, I went to get my son in El Salvador.

Q Now, you just testified you have been out of the country since 1974. I don't understand your answer, Mrs. Plasencia. Let's go back and try to remember when you last left the United States.

[5] A I came to Tijuana in 1974. I would just come and go.

Q Where have you been living the past year?

A I have been living at 526 South Union Avenue.

Q What city?

A Los Angeles.

Q Did you recently make a trip from Los Angeles to Tijuana?

A No, last Friday.

Q Do you mean that last Friday you went from the United States to Tijuana?

A Yes.

Q Who went with you, if any one?
A My husband.
Q Did anyone else go with you?
A No, just the two.
Q And how did you travel?
A In a car.
Q Why did you go to Tijuana?
A My husband wanted to see how much they would charge me for some dental work.
Q Is that the only reason why you went to Tijuana?
A Well, he was going to see about getting his car repaired because it had been smashed in in the front.
Q Didn't you go down to Tijuana for the purpose of meeting several people so that you could bring them back into the United States?
A No, this lady asked me if I would bring her son, but she assured me that he had his birth certificate, and this man that was going to [6] bring him to me was going to have his birth certificate.
Q What was the lady's name?
A Her name was Margarita. I don't know her last name.
Q What was her son's name?
A I don't know. I just found out that his name is Manuel. She didn't come because she isn't a resident.
Q How did you get back here to this Port on Friday from Tijuana?
A This person told me that we would just cross over with our own children's cards. When I arrived at the hotel, I found that there wasn't just one child. I encountered a bunch of people.
Q When you came back here to the Port, did you come by automobile?
A Yes.
Q Who was driving the car?
A My husband. There were some other people, but they said they had MICAs.
Q How many people were in the car?
A Two boys and two girls, six altogether.

Q Would that be six in addition to you and your husband?

A Yes.

Q Then that would be eight people in the car, right?

A Yes. Two of them had MICAs. There were three, my husband loaned them. They cried to him and asked that they be brought across.

Q Now, there were two boys, two girls, you and your husband, and two adults. Who were the last two? Two boys, two girls, and you and your husband, who else?

A They were waiting for somebody that was going to get them acrossed, [7] but is just came to me easy to just loan them MICAs that belonged to my children.

Q I just want to know who was in the car. Two boys, two girls, you and your husband, now, there were two other people, who were they?

A A boy and then another boy that I loaned my MICA to.

Q You mean there were four boys and two girls in the car?

A Yes, they were all young. They were waiting for some man from the ———— who arranges for people to come across, and he does this. He brings them across, but he didn't show up. From El Salvador to Tijuana, and then there is somebody else that picks them up. I went to get this boy and that's why they brought them there for me to bring them all.

Q Was there anyone in your group that was permitted to enter the United States?

A No, when we were coming in, the officer got us all and brought us in here.

Q To whom did you give your MICA?

A I have it.

Q Did you give any kind of a MICA to anyone?

A Yes, of my children, yes.

Q Who did you give your children's MICAs to?

A I loaned one to one of these young girls who looked like my daughter, but I don't know what her name was,

to a young boy that was ten years old, and to another young man that says he is 24 years old or 34 years old. That's it.

Q Where did you get all these MICAs to pass out?

[8] A They belong to my children.

Q You lent these MICAs to the three people you mentioned so that they could have documents to enter the United States, is that true?

A Yes, because my husband wanted to help them.

Q Why did you do this? What did you have to gain, Mrs. Plasencia?

A Nothing.

Q Nothing at all?

A Nothing before God, nothing.

Q When did you meet these people? Let's start with the young girl that you gave one of the MICAs to. When did you meet her?

A They were all there in the hotel.

Q And where was she from?

A They were all coming from El Salvador

Q And the ten year old boy, was he from El Salvador, too?

A Yes, he was the son of the people who had brought them into Mexico.

Q And the thirty-one year old, was he from El Salvador, too?

A They said they were from El Salvador.

Q Did you know any of these people before that day on Friday?

A No.

Q Wasn't there a mention of money involved in gaining their entry into the United States?

A No, the man just told my husband that he would fill his gas tank.

Q And how did you get together with him? How did it come to pass that they all ended up in your automobile?

A The rest of them had MICAs. This man who brings them across gets MICAs for them.

[9] Q Were they false MICAs?

A I don't know. I don't know what they were.

Q Do you know the man that gets the MICAs for them, don't you?

A He is the man that brings them across. It was there that we encountered him, and then he asked us to bring these others. My husband just felt sorry for them, and he said okay.

Q Did the other three have MICAs?

A They used my children's that didn't have any.

Q There were three that were given out by you that belonged to your children. Now, did the other three people in your vehicle have any MICAs?

A There were three that were coming with my children's, with the children's MICAs, and two more.

Q Who put you in contact with these people?

A I found these people in the hotel, and that's where I was to meet the one that the woman had asked me to bring across, and the only reason she wanted me to bring him across is because she couldn't come legally.

Q You're talking now about amount of children involved, aren't you?

A Yes, I'm talking about that young boy. He was the one we were going to bring across.

Q Well, how did you make contact with the adults in the group?

A Because when we got there, this man who brings them in told us that they were waiting for another man who was going to come and bring them all across.

Q Now, I understand that there was a sum of money up to $300.00 that [10] was to be paid by one of the persons in the group, isn't that true?

A No, there was no mention of money, I swear it. There was only the mention of gasoline.

Q I show you a MICA of one Mirna Lorena SANSUR, and I ask if she was in the group.

A She is my daughter. She carried all of the MICAs of the children.

Q Was this card used by Eugenia LINARES-Moreno?

A I don't know what her name was, but yes, I did loan that card to one of them.

Q I show you a photograph of the lady and ask if she's the, is that the photograph of the lady to whom you loaned the card?

A Yes.

TRIAL ATTORNEY:

No further questions of the applicant, your Honor.

JUDGE TO APPLICANT:

Q Mrs. Plasencia, I want to ask you a few questions. Did any of these people in the automobile with you when you were stopped at the Port of entry offer you any money at all at any time?

A No, only for the gas money.

Q When you say only for the gas money, what do you mean by that?

A No, because he did it just for pity.

Q I didn't ask you that. I asked you what do you mean by the gasoline? What are you talking about?

A What I was going to say was that we were only going to, just that they fill up the gas tank.

Q Who was going to fill up the gas tank?

[11] A the man that was going to bring them across gave him money for gas.

Q How much did he give him for gas?

A $25.00.

Q You say the man gave your husband $25.00 so your husband could fill up the gas tank?

A The man that had these people there.

Q Did anyone give you any money at all?

A None.

Q Did they give you any money for gasoline or for lunch or anything else?

A They took us to dinner that night before we came over.

Q Anything else?
A No that's all.

JUDGE:

Mr. Neubauer, do you have any evidence, written statements, concerning gain?

TRIAL ATTORNEY:

We have some witnesses, your Honor. That's all. I don't see any affidavits, and there are no statements, under oath or otherwise. We have witnesses who are presently available, however.

JUDGE:

Would you call your first witness, please? We'll let the record show that Linares-Moreno, Maria Eugenia has been called as a witness for the Service.

JUDGE TO WITNESS:

Q Will you please take an oath to testify truthfully. Do you solemnly [12] swear that all the testimony you give will be the full truth so help you God?
A Yes.
Q Please be seated. (Complies) What is your full name?
A Anna Elsa Lopez.

JUDGE:

Mr. Neubauer, will you examine the witness, please?

TRIAL ATTORNEY TO WITNESS:

Q Miss Lopez, I have a report before me indicating that your name might be Eugenia Linares-Moreno. Can you explain the difference in the two names?
A Because I was told to change my name.

Q Who told you to change your name?
A This lady here.

JUDGE:

We'll let the record show that the witness has referred to the applicant, Mrs. Plasencia.

TRIAL ATTORNEY TO WITNESS:

Q Is Lopez your legal name?
A Yes.
Q Did Mrs. Plasencia tell you why she wanted you to change your name?
A Yes.
Q What was the reason she gave you?
A That I should change my name in order to be able to come across.
Q When did you meet Mrs. Plasencia?
A Friday.
[13] Q What is the date and the place of your birth?
A I was born in El Salvador the 25th of June 1952.
Q When did you arrive at Mexico?
A I don't recall.
Q Just give me an approximation. Was it a week ago, or a few days ago or a couple of years ago?
A Last week.
Q Was it your intention to proceed from El Salvador to Mexico and into the United States?
A Yes.
Q How did you get to meet Mrs. Plasencia?
A I don't know how it happened but they arrived where we were.
Q Did you make some arrangements with Mrs. Plasencia to help you with your entry into the United States?
A Yes.
Q I show you a document which is the Form I-151 in the name of one Mirna Lorena SANSUR, and I ask if you recognize that document?
A No.

Q Will you look at it again and tell me if that's the card that you used to try to enter the United States?

A Yes.

Q Where did you obtain this Form I-151? Did you get it from Mrs. Plasencia?

A Yes.

Q After you obtained this card, did you sometime later travel with Mr. and Mrs. Plasencia in their automobile to this Port of Entry?

[14] A Yes.

Q When was that that you arrived here at the Port?

A Yesterday.

Q How many other people were in the car besides Mr. and Mrs. Plasencia and yourself?

A Five others.

Q Did you know any of the others?

A Yes.

Q How many of the other did you know?

A A wife of an uncle of mine. I only knew them by sight.

Q Did you make your own arrangements with Mr. Plasencia to get into the United States?

A Yes.

Q When did you talk to her about this?

A Yesterday, Saturday.

Q I understand that you came here Friday, is that right?

A Friday or Saturday, I don't recall very well.

Q Did you talk to her sometime before you arrived in the automobile with Mr. and Mrs. Plasencia and the others at this Port?

A Yes.

Q Was the conversation about your entry into the United States?

A Yes.

Q What was your agreement with her, if any?

A That when we got over there we would pay her.

Q How much were you to pay her?
A $250.00.
[15] Q When were you to make this payment?
A With work.
Q Do you mean that it was your intention first to find a job, and then you would pay her as you could in installments?
A Yes.
Q Was it your understanding that the payment was for the use of the MICA and for your transportation into the United States?
A Yes.
Q Where did the agreement take place between you and Mrs. Plasencia?
A In a hotel.
Q Did you recall the name, if so, will you name the hotel?
A No, I don't recall.
Q Was the hotel in Tijuana?
A Yes.
Q Were you registered at the hotel?
A No.
Q Did you make this proposal to Mrs. Plasencia or did she make the proposal to you?
A She made this proposal.
Q Was anyone present at that time except you and Mrs. Plasencia?
A Yes.
Q And who was present?
A The rest that were in the car.
Q You mean all of the other people that were in the car except Mr. and Mrs. Plasencia?
A Yes.
[16] Q Was Mr. Plasencia there too?
A Yes.

TRIAL ATTORNEY:

I have nothing further with this witness, your Honor.

JUDGE:

Mrs. Plasencia, do you want to ask the young lady some questions?

APPLICANT:

Yes.

APPLICANT TO WITNESS:

Q Young lady, when did I speak of money to you?
A Yesterday.
Q Do you swear to God that I spoke to you of money?
A Yes.

APPLICANT:

That's all that I can ask.

JUDGE:

Mr. Neubauer, do you have anything further of the witness?

TRIAL ATTORNEY:

I need to certify one thing, your Honor, which I'm confused on myself.

TRIAL ATTORNEY TO WITNESS:

Q Miss Lopez, what day was it that you arrived at this port in the automobile with Mr. and Mrs. Plasencia?
A It was a Sunday. It was about ten o'clock at night.
Q Was that yesterday?
A Yes.
[17] Q Miss Lopez, I show you a Form SW-409, a report of impersonation, dated June 30, 1975, in the name of Eugenia LINARES-Moreno, and I ask if you are the person named in the report.
A Yes.

Q Do you understand the information that is contained in this report?

A I don't recall.

TRIAL ATTORNEY:

Your Honor, I would like to ask the interpreter to read the report to the witness.

JUDGE:

We'll go off the record while the interpreter reads the report to Miss Lopez.

End of Belt #1.

JUDGE:

This is Belt #2 in the exclusion hearing involving Maria Antonieta PLASCENCIA, A30 738 083. Mr. Neubauer, will you please rephrase your question?

TRIAL ATTORNEY TO WITNESS:

Q Miss Lopez, you've already testified that you furnished the wrong name to the officer that made this report, because you were instructed or requested to do so by Mrs. Plasencia. Now, except for the name of yours on this report, is all of the other information on the report true and accurate?

A Yes.

Q Now I refer to the details of this report, which is the narrative portions here, and I ask if that reflects the information which you [18] gave to the Immigration officer.

A Yes.

Q Is that information the truth?

A Yes.

TRIAL ATTORNEY:

I offer the SW-409 dated June 30, 1975.

JUDGE:

Mrs. Plasencia, do you have any objection to this document being made part of the record?

APPLICANT:

No objection.

JUDGE:

The Form SW-409 is marked *Exhibit Number 3* and made part of the record. Mr. Neubauer?

TRIAL ATTORNEY:

I also offer the Form I-151 of Mirna Lorena SANSUR which has been identified from the witness as the MICA used by her.

JUDGE:

Mrs. Plasencia, do you have any objection to the alien registration receipt card which apparently belongs to your daughter and was used by Miss Lopez being made part of the record so I may consider the document when I reach a decision?

APPLICANT:

No objection.

JUDGE:

The Alien registration receipt card in the name of Mirna Lorena [19] SANSUR is marked *Exhibit Number 4* and made part of the record.

TRIAL ATTORNEY:

I have nothing further of the witness, your Honor.

JUDGE:

Mrs. Plasencia, do you want to ask Miss Lopez anymore questions before she is excused as a witness?

APPLICANT TO WITNESS:

Q Isn't it true that your uncle paid your fare all the way from El Salvador clear up here?

A The answer is no.

JUDGE:

Q Do you want to ask any other questions, Mrs. Plasencia?

APPLICANT TO WITNESS:

Q Your uncle told me that you paid him all the way to come from El Salvador clear into Tijuana, isn't this true?

A No, I have no family.

JUDGE:

Any further questions Mrs. Plasencia?

APPLICANT TO WITNESS:

Q Isn't Arturo ——— your uncle that we met at the hotel?

A No.

JUDGE:

Miss Lopez, you're excused as a witness. Thank you. Mr. Neubauer, who is your next witness, please?

TRIAL ATTORNEY:

Alfredo SANTILLANA.

[20] JUDGE TO WITNESS:

Q Mr. Santillana, before you testify, will you please raise your right hand? Do you solemnly swear that all the testimony you give will be the full truth so help you God?

A Yes.

Q Please be seated. (Complies) What is your full name?

A May name is Jose Alfredo SANTILLANA.

JUDGE:

Mr. Neubauer, will you examine your witness, please?

TRIAL ATTORNEY TO WITNESS:

Q Mr. Santillana, I have your name as Alfredo Santillana. Which is your legal name?

A My legal name is Jose Alfredo SANTILLANA.

Q Did you drop the Jose when you furnished information to the Immigration officer?

A No, I gave it completely.

Q I show you a Form SW-409 which is a report of impersonation dated June 29, 1975, and I ask if you are the person named in this report.

A Yes.

Q Now, is the information in the report with regards to your date and place of birth, that is, March 10, 1953 in El Salvador, is that correct?

A It's correct.

Q Are you a citizen of El Salvador?

A Yes.

Q Will you check all of the other information in the report and deter- [21] mine whether there are any errors in the report?

A It is correct.

Q You refer in this report that you obtained a card from a lady in a hotel. Now, I show you a Form I-151,

Alien Registration we call it, and I ask you if this is the card to which is referred in this report?

A Yes.

Q Did you use this card yesterday, the 29th, for the purpose of attempting to enter the United States?

A Yes.

Q Is this your own card, or does it belong to someone else?

A It isn't mine.

Q Is referred to in this report as the person from who you obtained this card.

A I don't know her. I only knew her when she sold it to me, but I didn't know her.

Q Look around this room and see if you recognize her.

JUDGE TO WITNESS:

Q Do you recognize the lady in the room, the lady that sold you that card?

A No.

TRIAL ATTORNEY TO WITNESS:

Q Did you arrive here yesterday in an automobile in the company of several people?

A Yes.

Q Do you recognize any of those people in this room?

[22] A Yes.

Q Will you point to those people?

A I was with them because I asked for transportation.

JUDGE:

We'll let the record show that the applicant is referring to Mrs. and Mr. Plasencia.

TRIAL ATTORNEY TO WITNESS:

Q When did you ask them for transportation?

A I was just out on the road, and I asked them if they would stop and pick me up.

Q Did you meet them at the hotel?

A No.

Q Were you hitchhiking on the road at the time?

A Yes.

Q When Mr. and Mrs. Plasencia stop to pick you up, why kind of conversation took place?

A Only that they would just give me a ride to Los Angeles.

Q And was there any mention of money?

A No.

Q I call your attention to this report. There's a statement in here that says they were to be paid $200.00 after arriving in Los Angeles. Will you explain what that means?

A The person that sold me that card was going to meet me over on the other side.

Q Did you agree to pay Mr. and Mrs., or either one of them, that is Mr. and Mrs. Plasencia anything at all for the transportation into [23] the United States from Mexico?

A No.

TRIAL ATTORNEY:

I have nothing further for this witness, your Honor.

JUDGE:

Mrs. Plasencia, do you want to ask the young man any questions before he is excused as a witness?

APPLICANT:

No.

JUDGE:

Mr. Neubauer, who is your next witness?

TRIAL ATTORNEY:

Luis POLIO-Medina.

JUDGE TO WITNESS:

Q Mr. Polio, will you please stand and take an oath to testify truthfully? Do you solemnly swear that all the testimony you give will be the full truth so help you God?

A That's the way it is.

Q What is your full name, sir?

A Luis Felipe POLIO-Medina.

JUDGE:

Mr. Neubauer, will you examine the witness?

TRIAL ATTORNEY TO WITNESS:

Q Is Luis POLIO-Medina your true legal name?

A Yes, it is.

Q Did you arrive at this port yesterday for the purpose of entering the [24] United States?

A Yes.

Q Will you now examine this Form SW-409 dated June 29, 1975, and state if you are the person named in the form?

A Yes.

Q Is all of the information contained in the report true and accurate?

A Yes, the official told me to tell the truth, and that's what I did.

Q I now show you a Form I-151 and I ask if you had this document in your possession at the time of your attempted entry?

A Yes.

Q Is that your card?

A Actually, no.

Q Where did you get the card?

A She gave it to me.

JUDGE:

We'll let the record show that the applicant is referring to Mrs. Plasencia.

TRIAL ATTORNEY TO WITNESS:

Q When did you meet Mrs. Plasencia?

A Yesterday.

Q Why did she give you this MICA?

A So that we could come across.

Q I have another card that is a Social Security Card which is made out to the same person Mr. Jorge Sansur. Did she give you this card as well?

A Yes.

[25] Q How much did you pay, if anything, for these cards?

A I haven't paid her.

Q What were you to pay her, if anything?

A Nothing to somebody that was over in the United States.

Q Was there an agreement entered into between you and Mrs. Plasencia with regard to these cards?

A What kind of an agreement?

A An arrangement with regard to these cards and with regard to payment of anything for the use of these cards.

A I wasn't going to pay for the cards.

Q What were you going to pay for, if anything?

A Just for the trip to Los Angeles.

Q How did you arrive at this understanding and with whom?

A I don't know who she spoke with because she arrived at the hotel.

Q Did you talk to her at any time?

A No, only when she was going to bring me.

Q Didn't you get these cards from her?

A Yes, she gave them to me.

Q Was there any talk at that time of payment for the transportation to Los Angeles?

A No.

Q If you made any agreement for the transportation, what was it?

A We came in a group and it was kind of an understanding that we were going to pay her.

Q How much were you to pay?

A We hadn't spoken of a price.

[26] Q When were you to make this payment?

A When we arrived.

Q After you got to Los Angeles, you were to pay a certain amount of money?

A Yes, because I have friends over there, and I was going to see if I could arrange to meet them.

Q What did you intend to pay for this transportation?

A What I consider normally what they charge for this is the normal amount.

Q Was there any understanding that you would pay this upon reaching Los Angeles?

A Not directly, but I was to meet up with some people in Los Angeles. They were going to make the payment.

Q How did that understanding come about that they would make the payment?

A Because I was going to look for them.

Q They were going to make the payment in your behalf, to whom?

A To them.

Q Who do you mean by them, Mrs. and Mr. Plasencia?

A Yes.

Q Explain please why these people that you were to meet in Los Angeles were to make the payment. Was there some prearrangement for this?

A Yes, I have this friend, and he told me that when I wanted to come that he would help me.

Q What's his name?

A I had his address, but I lost it.

[27] Q Is it that this friend was to make the payment in your behalf to Mr. and/or Mrs. Plasencia? Had this already been arranged between them?

A I think so.

Q How do you know this? Did Mrs. Plasencia

A No, they had communications with me at El Salvador that I was to come and then they were going to meet me.

Q Who had communications with you?

A That person that I said I had forgotten his name.

TRIAL ATTORNEY:

Your Honor, I'm going to offer the SW-409 dated June 29, 1975, with the MICA and Social Security Card identified by the witness attached as one exhibit.

JUDGE:

Mrs. Plasencia, do you have any objection to the Immigration report and the MICA and Social Security Card being made part of the record?

APPLICANT:

No.

JUDGE:

The documents will be jointly marked as *Exhibit Number 5* and made part of the record. Mr. Neubauer?

TRIAL ATTORNEY:

Nothing further, your Honor.

JUDGE:

Mrs. Plasencia, do you want to ask this gentlemen any questions before he is excused as a witness?

[28] APPLICANT TO WITNESS:

Q I would just like to say, at what moment did you offer me money?

A I haven't said that I offered you any money. I have said that the arrangements were already made and you were to drive me.

JUDGE:

Mrs. Plasencia, do you want to ask any other questions of this gentleman before he is excused as a witness?

APPLICANT TO WITNESS:

Q Did you say that you knew that we were going to go and get you?

A No, I didn't know. There are so many that make it their duty to take people across that I didn't know who it was going to be.

JUDGE TO WITNESS:

Q Mr. Polio, did you pay Mrs. Plasencia any money for this MICA and Social Security Card that I have marked as *Exhibit Number 5*?

A The first officer that questioned me asked me if I had bought it and I said yes, but actually I haven't bought them.

Q Do you mean by that that Mrs. Plasencia gave you these cards that I've marked as *Exhibit 5*?

A Yes.

Q Was it your understanding that you were going to pay her an amount of $200.00 after you arrived in Los Angeles?

A Yes, because I don't actually know what the arrangements were that she had made.

Q Did you also understand that you were going to return these two documents to Mrs. Plasencia, that is the Social Security and Alien Registration Receipt Card?

[29] A Yes, because they belonged to her.

Q Did she personally give you these two documents?

A Yes.

Q And did she agree to take you to Los Angeles?

A Yes.

JUDGE:

Mrs. Plasencia, do you have any other questions you want to ask this young man?

APPLICANT TO WITNESS:

Q Did I ask you if I was going to charge you a certain amount of money?

A I had said that I wasn't going to pay any money to you. I figured that the arrangements had already been made ahead of time.

Q Had I made arrangements with anyone in Los Angeles that I was going to take you over there?

A Undoubtedly, because you came over there after us.

Q What I want is for you to tell the truth. Now, who did you pay for your trip from El Salvador up here?

A On the bus, I paid.

JUDGE:

Do you want to ask any other questions, Mrs. Plasencia?

APPLICANT:

No, no more questions.

JUDGE:

You are excused as a witness.

JUDGE TO APPLICANT:

Q Mrs. Plasencia, the principal reason for the hearing this afternoon [30] is to give you a fair opportunity to make a statement and to present documents and witnesses to show why you are not subject to exclusion. Do you want to make a statement or present documents or witnesses?

A They said that they had no money. The man who makes the arrangements for this trip, they pay him, and that trip is from El Salvador to Los Angeles. I'd like to repeat what I said before. This lady that I know is the Grandmother of this little child, and she knew that I was coming to Tijuana. Since I was coming, this man who brings them across had this boy here with his

birth certificate, and he brought this boy to me and told me it was his child, but he didn't come because he didn't have proper papers. He said that this child was born in the United States and it was through this that we met these people. I made no arrangements with anybody. He is a witness. My husband is a witness. They make arrangement with the person who was going to bring them all the way to the United States. He is an uncle. They are covering up for the people who are in Los Angeles. I swear that I have never done this before and I will never do it again.

JUDGE:

Mr. Plasencia, do you wish to say something?

JUDGE TO MR. PLASENCIA:

Q Mr. Plasencia, will you take an oath to testify truthfully? Do you solemnly swear that the testimony you give will be the full truth so help you God?

A Yes.

Q Please be seated. (Complies) What is it you wanted to say, sir?

[31] A I wanted to say was that my wife—that she has never done this before in her life and either have I and it will never happen again. We ask for your forgiveness, not only from you but also from this officer over here and this lady. It will never happen again no more. We have the children now to take care of, they're at home now—. We ask the court, your Honor, and also this officer if you could please forgive not only me but her and we could go home to our children. It will never happen again. I swear on my mother's grave, and I swear on my word of honor, too. It will never happen again.

Q Mr. Plasencia, when was your wife admitted to the United States for permanent residence, that is, when did she become an immigrant?

A She immigrated in 1969.

Q Was she admitted into the United States as an immigrant on or about March 6, 1970?

A I believe so. I'm not familiar with, you know, like I've said before,—. It will never happen again. We got married in March, I don't remember the day, of 1969 up in Los Angeles.

Q How many children are there of the result of your marriage?

A None, she had some that I've adopted.

Q Are those children immigrants?

A —from the home country.

Q Is there anything that you would like to say?

A I would just like to repeat, your Honor, if you could please forgive not only me, but my wife. This will never, never, this will never happen again as long as I live. Because I do love my wife, and I [32] am very sorry that this incident happened. We do this as a favor to these people, and it turned out to be for the money. It wasn't. ———— but my wife is a good kind hearted person. I was not aware or familiar with ———— cause I did mention in the past that I would try ———, and I further that, your Honor.

JUDGE:

Very well, Mr. Plasencia, thank you. This is my oral decision. (At this point in the proceedings, in the presence of the applicant, his counsel, witnesses, and the Trial Attorney, the Immigration Judge delivered an oral statement of his decision in this case. This has been transcribed separately and is attached hereto.)

JUDGE TO APPLICANT:

Q Mrs. Plasencia, you've heard my decision. Do you understand it?

A Yes.

Q If you think the decision is wrong, you do have a right of appeal. You can either accept my decision or you can take an appeal. Do you accept my decision?

A No, we do not accept it.

Q Alright, I give you the Form I-290A in triplicate. I tell you that you must file the forms immediately with the $25.00 fee. The hearing is closed.

HEARING CLOSED

I hereby certify that to the best of my knowledge and belief the foregoing pages numbered one through thirty-two are a complete and accurate transcript of the hearing herein.

/s/ Cathy S. Brown
CATHY S. BROWN
Transcriber, ECD, 8-27-75

Form R RWilliams SJS SYS

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

$ 25.00	FEE PAID No. B4S 76-12
Immigration and Naturalization Service San Ysidro, California	
Date 7/2/75	Verified by JK

In the Matter of:

Maria Antonieta Flasencia

File No. A30 738 083

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated June 30, 1975, in the above entitled case.

2. Briefly, state reasons for this appeal. I feel that my wife is a very kind and considerate person. She is big hearted, and she likes to help people. She never says no to anything I beg the Court of Appeals with all my heart, and with my word of honor that what I have said is true. I am now left with the children, and they need her. They need their mother I need her too. I swear on my flag because I was born in the United States that she will never, ever do such a thing again. Due to what happened, it was a favor to start with, out of pity. Then they turned around and accused her of malicious lies. This is not true and never was true. We have been married seven years, and have never been in trouble of any kind before.

Therefore again, I beg the Court, to please forgive her for the sake of the children and myself. All that these people from El Salvador said about my wife was untrue. Mind you, she has always been an honest person. I was also teaching her the commandments in order that she could become a United States citizen. In closing I would to see that I and the children would appreciate very highly if you would pardon her, and permit her to be home with us again. Thank You very much. P.S. Thanks again with my heart, and the children's too.

3. I do not (do) (do not) desire oral argument before the Board of Immigration Appeals in Washington, D. C.

4. I am not (am) (am not) filing a separate written brief or statement.

Husband's Signature Joseph Flasencia.

(Signature of Applicant or attorney or representative)

Joseph Flasencia

(Print or type name)

Los Angeles, California 90017
526 South Union Avenue, Apt. 208,

Address (Number, Street, City, State, Zip Code)

June 30, 1975

Date

069

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev. 10-1-71)N

88

SUPREME COURT OF THE UNITED STATES

No. 81-129

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIA ANTONIETA PLASENCIA

ORDER ALLOWING CERTIORARI

Filed January 11, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 356977 804

Opposition

filed 9-28-81

NO. 81-129

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE,

Petitoner

v.

MARIA ANTONIETA PLASENCIA

Respondent

BRIEF IN OPPOSITION

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NO.81-129

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE,

Petitoner

v.

MARIA ANTONIETA PLASENCIA

Respondent

BRIEF IN OPPOSITION

Pursuant to Rule 34.2, Rules of the Supreme Court of the United States, respondent will include herein only the Questions Presented, Table of Contents, Table of Authorities, Statement of the Case, Summary of the Argument, Argument and Conclusion.

QUESTIONS PRESENTED

Whether the District Court and Court of Appeals correctly determined that (1) the evidence presented at respondent's "exclusion" hearing did not support an administrative finding that respondent's two-day departure from the United States was "meaningfully interruptive" of her lawful permanent residence, and (2) that the procedures adopted at her "exclusion" hearing violated Fifth Amendment due process given that (i) the potential resident of the United States returning from a two day trip abroad, (ii) is suspected of attempting to smuggle persons into the country, (iii) was scheduled for a hearing within hours of being detained at the U.S. border, (iv) learned for the first time at the hearing of the nature of the charges, (v) was not informed that the hearing could be continued to a later date, (vi) was allowed to waive her right to the assistance of counsel without being questioned as to her understanding of the complexity of the issues involved or to determine whether the waiver was intelligently made, (vii) was not informed of the Immigration Judge's subpoena powers to obtain the attendance of witnesses, (viii) was not explained the burden of proof prior to commencement of the hearing, (ix) was cut off during extremely abbreviated efforts to cross-examine government witnesses, (x) was required to "object" to exhibits written in the English language which respondent neither read nor spoke and without having the exhibits translated for her into Spanish, (xi) was never shown a copy of the relevant law and possible defenses involved in the "exclusion" charges against her, (xii) the government "Trial Attorney" was permitted to ask leading questions of his witnesses, and (xiii) neither the "Trial Attorney" nor the Immigration Judge raised discrepencies between the testimomony of government witnesses (called by the "Trial Attorney") and prior statements of these witnesses contained in exhibits (in English) submitted into evidence?

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STATEMENT OF THE CASE

Respondent is a national of El Salvador who was lawfully admitted to the United States for permanent residence on March 6, 1970. Appendix A, Certified Administrative Record, infra, hereinafter "App.A", 29. She is married to a United States citizen. Petition for a Writ of Certiorari, Appendix A, hereinafter "Pet.App.", 16a. On June 27, 1975, she and her husband went from Los Angeles to Tijuana to explore the prices on dental work she needed. Appendix A, hereinafter "App.A" at 31. Two days later, on June 29, 1975, she was taken into detention by Immigration and Naturalization Service ("INS") agents while attempting to enter the United States in the presence of her husband and approximately six non-resident, apparently undocumented immigrants. Pet. App., 16a.

Respondent was taken into custody at approximately 9:27 p.m. on June 29, 1975 a sunday evening. App.A, 22. Nowhere does the record reflect that she was advised that she could contact an attorney for assistance. The next morning respondent, who does not speak or read English, App.A at 27, was served with an English notice of the charges against her, App. A at 20, and by 11:00 a.m. her "exclusion" hearing commenced. Ibid. The Immigration Judge introduced the notice of charges form into evidence as the Government's "Exhibit 1" without asking respondent how many hours before the 11:00 a.m. exclusionary hearing she was served with the notice or whether she objected to its admissibility. Id at 28.

In exclusion hearings the Immigration Judge is empowered to issue subpoenas and to order the taking of depositions. Section 235(a), Immigration and Nationality Act of 1952, hereinafter "INA", 8 U.S.C. Sec. 1225(a); 8 C.F.R. Sec. 287.4, 236.2(d). While approximately "six" persons attempted to enter the United States with respondent, App. A at 32, only three witnesses were called by the government. Id. at 38, 45 and 49,

and significantdiscrepancies (unexplored by the Immigration Judge) came out during their testimony (see discussion infra at pp.13—15).
Given this state of affairs production of the other three witnesses through the Immigration Judge subpoena power would have been important to respondent.

At no time did the Immigration Judge inform respondent that the hearing could be continued to provide her with a reasonable opportunity to gather evidence, locate counsel, prepare applications for discretionary relief, etc. Id. at 27-28. Nor did the Immigration Judge explain who would carry the burden of proof or what standard of proof would apply. Ibid.

Respondent was allowed to waive her right to counsel with a single question and response. Id.at 27. No effort was made to determine whether she understood the gravity of the hearing,[1/] the complexity involved in the charge made against her, that the government would be represented by an attorney, her need for and/or awareness of available free legal services, etc. Ibid. The presence of counsel at the hearing would have allowed for effective cross-examination of witnesses who gave testimony which was often inconsistent with prior statements given to INS and with the testimony of other Government witnesses. (See discussion infra). An attorney probably would have demanded production of the other three witnesses and of the INS agents who took the pre-hearing statements of the witnesses who did testify. Id. at 22 and 24.

While respondent was told that she would have the right "to look at and point out errors. . . about any document" introduced into evidence, Id. at 27, in fact exhibits written in the English language were introduced without being translated for her into Spanish. Id. at 44 and 53 (documents

1/ The record shows that neither respondent nor her husband understood the gravity of the hearing and the irrevocable nature of its findings. Id. at 30-32.

reproduced at 22 and 24). While respondent was advised that she had the right to call witnesses, Id. at 27, she was never told whether the three persons apprehended with her and not called by the Government were still in custody or whether they had provided statements to INS similar to the prehearing statements of two of the INS witnesses who testified.

If the applicant is not represented by counsel, "the immigration judge assists him in the presentation of his case." Gordon and Rosenfield, Immigration Law & Procedure, hereinafter "Gordon and Rosenfield", Sec. 3.20e, at 3-192 (1980), citing 8 C.F.R. Sec. 236.2(a) and (b). In this case the government's witnesses made inconsistent statements and statements which contradicted earlier statements which they had provided to an INS agent. (See discussion infra). Despite these obvious discrepancies the Immigration Judge made no effort to assist respondent during the hearing. In fact, substantial evidence indicates that respondent was not transporting persons illegally into the United States "for gain". See, e.g.,App.A at 24 (only "the driver" — i.e. not respondent — was to be paid in the future); at 36 (only gas money to be paid); at 47 (government witness could not identify respondent as person he paid); at 48 (government witness says there was "no" discussion of money); at 49 (government witness states he did not agree to pay respondent any money); at 51 (second government witness states "I wasn't going to pay" respondent); at 51 (second government witness says there was "no" talk of payment for transportation).

Respondent was found to be permanently excludable from the United States and stripped of her five year old lawful residency in an "oral decision" rendered by the Immigration Judge less than twenty-four (24) hours after her initial detention. Id. at 16. The Immigration Judge correctly notes that respondent admits to assisting persons to enter the United

States without inspection, but "she argues that she did so without personal gain. . ." Id. at 17. He incorrectly concludes that "[s]he asserts the only payment involved was $25.00 she received for gasoline." Ibid. (emphasis added). Respondent did not make such a concession. She was not the driver of the vehicle and it was the driver (her husband) who one witness claimed was to receive money. Id. at 24. The Immigration Judge held that respondent had made a "meaningful departure" from the United States, Id. at 18, and that she was to be "excluded and deported from the United States." Id. at 19.

On June 30, 1975 respondent's husband filed an appeal on behalf of respondent, Id. at 14, which appeal was summarily denied on October 23, 1975. Id. at 13. A motion to reopen the proceeding was filed by counsel in October 1975, Id. at 5 through 10, and that motion was denied on February 11, 1976. Id. at 1-2.

The matter was then appealed to the United States District Court, Central District of California, which held that "a meaningful departure did not occur in the instant case 'based upon the evidence presented at the exclusion hearing.'" Pet.App. at 13a, 21a. The lower court was also concerned with whether respondent "had a fair hearing. . ." Id. at 17a. Petitoner appealed this decision to the Ninth Circuit Court of Appeals which upheld the district court's opinion and order. Id. at 1a —11a. The Court of Appeal directly addressed the absence of due process in respondent's exclusion hearing. Id. at 2a — 3a. The Court found that respondent was "prejudiced" by the procedures followed in her exclusion hearing, Id. at 6a, and ordered that the question of whether respondent's departure from the United States was "meaningfully interruptive" of her permanent residence should be determined in a due process deportation hearing. Id. at 7a.

A petition for rehearing was denied and the panel voted unanimously to reject the suggestion for rehearing en banc. Id. at 32a. This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

1. Respondent was not afforded due process of law in her "exclusion" hearing. The hearing should have been continued to provide adequate and/or a reasonable time for her to obtain witnesses, locate counsel, etc. She did not knowingly and intelligently waive her right to counsel. Documents admitted into evidence (prior statements of Government witnesses) were not translated for her into Spanish language totally destroying her right of cross-examination. The Immigration Judge failed to pursue obvious discrepancies in the testimony of the key Government witness. Respondent was deprived of many procedural protections which would have been available in a deportation hearing but were withheld in her exclusion hearing.

2. In order to be held in an exclusion hearing the Government has the burden of proof to establish that respondent made a "meaningful departure" from the country breaking her permanent residence here. The lower courts correctly found that the evidence presented at the hearing did not establish that respondent had made a "meaningful departure." Two out of the three Government witnesses called provided testimony which, when considered with the testimony of respondent, showed that she had not made a "meaningful departure" from the United States.

3. The lower court decisions in this case are entirely consistent with the previous decisions of this Court and of other federl courts.

ARGUMENT

The issue in this case is "whether the Immigration and

Naturalizaton Service (INS) may determine, at the border, in summary exclusion proceedings, whether a lawfully admitted permanent resident alien may return to the United States after a brief visit abroad." Pet.App. at 1a (emphasis added). Both the district court and the Ninth Circuit Court of Appeals answered in the negative. Given the manifest absence of due process procedural protections afforded respondent at her "summary" exclusion hearing, both lower courts were unwilling to uphold the administrative decision to terminate respondent's five-year lawful permanent residence status in this country. They held that her status should be determined in deportation proceedings which are "subject to much more stringent procedural safeguards. . ." Id. at 3a.

The Court of Appeal's decision in this case is not in conflict with the decisions of other federal courts or with the prior decisions of this Court. This case does not raise important federal questions which warrant plenary review by this Court.

A. Petitioner's Exclusion Hearing Procedures Were not Adequate To Protect Respondent's Fifth Amendment Due Process Rights

Petitioner agrees that respondent was entitled to basic procedural due process in her exclusion hearing. Petition for a Writ of Certiorari, hereinafter "Pet.Cert." at 14—15. Petitioner and respondent disagree over the amount of process that respondent actually received. Petitioner argues that the "procedural protections available at exclusion hearings are similar in most significant respects to those available at deportation hearings." Id. at 15. In contrast, respondent believes the protections she was afforded are significantly different from what would be required to meet minimal due process standards. If petitioner sincerely believes that the protections which respondent would be afforded under the

decision of the Ninth Circuit are not significantly different from those which he is willing to provide, it is difficult to understand how he can complain that the effect of the decision will be "substantial", warranting plenary review by this Court. Id. at 17.

1. Summary of Differences Between Exclusion and Deportation Proceedings

There is a "marked conceptual difference between an exclusion proceeding. . . and a deportation proceeding. . ." Gordon & Rosenfield, supra, Sec. 3.18, at 3-177. This conceptual difference, according to the foremost treatise in immigration/deportation law, "is significant. . . in the constitutional protections that may be invoked." Id. at 3-179. This Court has long recognized that while

> [T]he power to exclude or to expel aliens. . . is vested in the political departments of the government, and is to be executed by the executive authority according to the regulations so established, except so far as . . . is required by the paramount law of the Constitution, to intervene.

Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893) (emphasis added).

In deportation proceedings the respondent would have a clear right to at least seven (7) days notice of the specific charges against him/her. 8 C.F.R. Sec. 242.1(b). Reasonable continuances are granted in order to provide adequate prepartation time. 8 C.F.R. Sec. 242.13. An immediate hearing without adequate time to prepare would be improper. See, e.g., Cheung v. INS, 418 F.2d 460 (D.C.Cir. 1969). In contrast, under petitioner's regulations exclusion hearings may be held immediately and "the Immigration Judge's consideration is not restricted to the exclusion ground suggested by the primary inspector. . . [T]he Immigration Judge should inform the applicant of the issue at some time during the hearing . . ." Gordon and Rosenfield, supra, Sec. 3.20e, at 3-192 (emphasis

added).

Regulations require that the Immigration Judge in deportation proceedings advise a respondent of his/her apparent eligibility to apply for various forms of discretionary relief. 8 C.F.R. Sec. 242.17(a). No similar requirement exists in exclusion hearings, even though Immigration Judges are empowered to consider various "waivers of excludability." See, e.g., Gordon and Rosenfield, supra, Secs. 1.10c, 2.43d(5), 3.20b, and 4.15d.

In deportation proceedings the respondent is entitled to designate the place to which s/he wishes to be deported (subject to acceptance by that country). The Immigration Judge "is required to acquaint the respondent of the statutory prescriptions regarding the place of deportation that will be applicable in the event his deportation is ordered." Id., 5.8f, at 5-101; Section 243(a), INA, 8 U.S.C. Sec. 1253(a). The Immigrtion Judge "must inform the respondent of his privilege of designating a country of deportation and must give him an opportunity to make such designation." Gordon and Rosenfield, supra, Sec. 5.8f, at 5-101; 8 C.F.R. Sec. 242.17(c). No similar right obtains in exclusion hearings. This could be particularly important to a long-time resident like respondent now facing removal to El Salvador, a country in the midst of a civil war.

In deportation hearings the respondent is specifically entitled to review the prior statements of witnesses presented by the Government, to aid in their cross-examination. Carlisle v. Rogers, 262 F.2d 19 (D.C.Cir. 1958); Gordon and Rosenfield, supra, Sec. 5.9g, at 5-109. No similar right is provided in exclusion proceedings. At respondent's hearing the Government presented witness, Mr. Luis Pollo-Medina, App. A at 49, without ever producing his prior statement to INS. Ibid.

Various forms of relief from expulsion are available in deportation but not in exclusion hearings. See, e.g., Gordon

and Rosenfield, supra, Sec. 5.16, 7.4 through 7.12. In short, petitioner suggests that an "illegal alien", apprehended ten minutes after entering the United States for the first time in his/her life, should be entitled to more due process (i.e. a deportation hearing) than respondent who is a long-time lawful permanent resident detained at the border. Or, respondent would be entitled to much less harsh treatment if she had entered the country with undocumented migrants at a place in the mountains, other than a port-of-entry, and had been apprehended five minutes after entering the country. Petitoner's Board of Immigration Appeals itself has rejected such "capricious" and "absurd" consenquences as "chance might be the factor determining substantive rights." See, e.g., Matter of A., 2 I & N Dec. 459, 461-62 (1946); Matter of S., 6 I&N Dec. 392 (1954); Matter of F., 6 I&N Dec. 537 (1955); Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

2. Respondent's Due Process Rights Were Violated When The Hearing Proceeded Within Twelve Hours Of Her Detention And On The Same Day That She Received Notice Of The Charges

The record in this case clearly shows that respondent was detained by INS agents late on a Sunday night, was given notice of the charges against her at some unknown hour on Monday morning, and shortly after 11:00 a.m. had been determined to be "excludable and deportable." App.A at 16, 20, 22, 24, 26. This was not a hearing to determine the removal of a recently arrived undocumented migrant without lawfully resident relatives living here. It was a hearing to determine the continued lawful status of a five-year resident, who had been married to a U.S. citizen and caring for their children for approximately five years. App. A at 57.

In Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 (1962), this Court noted that a "fundamental requirement" of

due process in "any" proceeding is "notice reasonably calculated, under all the circumstances, to apprise insterested parties of the pendancy of the action and afford them an opportunity to present their objections." 371 U.S. at 211, 83 S.Ct. at 282. More precisely, "at a minimum" due process requires that deprivation of life, liberty or property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-57(1950) (emphasis added); Groppi v. Leslie, 404 U.S. 496, 503, 92 S.Ct. 582, 586 (1972); Morgan v. United States, 304 U.S. 1, 18-19, 58 S.Ct. 773, 776 (1938).

Given the "nature" of this case, respondent was entitled to more than one-night's sleep before having to face the question of whether she would have to abandon her nuclear family, her home and community. As a lawful permanent resident the rapidly scheduled hearing would have "drastic" results for her. Bridges v. Wixon, 326 U.S. 135, 154 (1945). She stood to loose "all that makes life worth living. . ." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). Under these circumstances respondent had nothing close to a full "opportunity to be heard" upon the questions involving her right to be and remain in the United States. Kauro Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903); accord Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Wong Yan Sung v. McGrath, 339 U.S. 33 (1950). The expeditiousness with which her hearing was scheduled precluded locating counsel, becoming familiar with available free legal services, obtaining witnesses, becoming familiar with the charges and defenses, etc. Respondent, a non-English speaking, indigent woman unwittingly failed to say "I need help" - - and was rapidly dealt a "savage" blow by the Immigration Service. Jordan v. De George, 341 U.S. 223, 243 (1951).

3. Respondent Did Not Knowingly And Intelligently Waiver Her Right To Counsel

At her hearing respondent was on the threshold of exclusion from the country -- "a drastic measure and at times the equivalent of banishment or exile. . ." Fong Han Tan v. Phelan, 333 U.S. 6, 10 (1948) -- and should have been carefully questioned to determine her understanding of the act of waiving assistance of counsel.

That the typical uncounseled individual detained by the I.N.S. is ill-prepared to make a decision waiving a fundamental right is beyond dispute:

> The persons involved in immigration proceedings usually are aliens, and generally they are in the less privileged economic class. Often they are at the threshold of our country, or have recently arrived, and they have little or no comprehension of our language or institutions. The cases affecting those individuals sometimes pose complicated factual or legal questions. Obviously the services of counsel can be quite valuable in protecting those persons' rights and status.

Gordon, Right to Counsel in Deportation Proceedings, 45 Minn. L.Rev. 875, 877 (1961)

In civil, no less than in criminal cases, courts indulge every reasonable presumption against the waiver of due process rights. Fuentes v. Shevin, 407 U.S. 67,95 n.31 (1972). The party asserting that a waiver has been made must present "evidence adequate to rebut the strong presumption against waiver of constitutional rights." Gonzalez v. County of Hidalgo, 489 F.2d 1043,1046 (5th Cir. 1973). And although this Court has yet to authoritatively decide whether the same waiver standard applies in civil as in criminal cases, lower federal courts have uniformly applied identical standards. See, e.g., United States v. Wynn, 528 F.2d 1048, 1050 (5th Cir. 1976); American Consumer, Inc. v. United States Postal Service, 427 F.Supp. 589, 591 (E.D.Pa. 1977). Thus, in order to waive due process rights, albeit in a civil context, there must be a

voluntary, intelligent relinquishment of a known right or privilege. Brewer v. Williams, 430 U.S. 387, 404 (1977).

In Partible v. Immigration and Naturalization Service, 600 F.2d 1094 (5th Cir. 1979), the court held that even though an advisal regarding the right to counsel is given, this right is not necessarily waived unless a full explanation of the need for counsel is also given:

> Although Partible was informed at the commencement of the hearing by the immigration judge of her statutory right to counsel and nevertheless elected to proceed unassited, she waived her rights without being provided with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf. . .

Id. at 1096; see also, Handlovits v. Adock 80 F.Supp. 425, 428 (E.D.Mich. 1948)(duty to explain right to counsel "not in a perfunctory way but in a manner which would assure. . . that the alien fully understood her rights. . ."); Yiu Fong Cheung v. Immigration and Naturalization Service, 418 F.2d 460, 463 (D.C.Cir. 1969)(valid waiver of right to retained counsel requires time to reflect on pros and cons of such waiver; statement by respondent that he wished to proceed without counsel inadequate); Matter of Gutierrez, Board of Immigration Appeals Interim Decision No. 2587 (May 26, 1977).

Respondent was never told how counsel may assit her, or that the Government would be represented by counsel, or that the hearing would be adversary, before being asked in a perfunctory manner: "Do you want to be represented?" App.A, at 27. The parent and wife of U.S. citizen family and lawful resident of this country deserves more than this under our due process notions. The entire hearing transcript reflects respondent's inability to represent herself. Her situation is all the more tragic when one recognizes the discrepancies in evidence (see infra) which were studiously ignored by the Government "Trial Attorney" and the Immigration Judge.

4. The Conduct Of The Hearing Violated Respondent's Due Process Rights Under The Fifth Amendment

(a) Right to Cross-Examination

The right to cross-examination is one of the stoutest pillars of due process. Pointer v. Texas, 380 U.S. 400, 404 85 S.Ct. 1065 (1965). The Immigration Judge seemed to recognize that respondent had to be given a "reasonable opportunity to examine and cross-examine witnesses. . ." Gordon and Rosenfield, supra Sec. 3.19b, at 3-183; App. A at 27. However, the record reflects that documents (prior statements of two witnesses), written in English by third-parties, were introduced into evidence without being translated or explained to respondent. App.A at 43-44, 53. Faithfully, the Immigration Judge would ask respondent whether she had "any objection", and she would reply "no objection", having no idea what the documents contained. Ibid.

(b) Glaring Discrepancies In The Testimony Of Government Witnesses Should Have Resulted In Respondent Receiving Assistance In Cross-Examining These Witnesses

The record shows many significant discrepancies and inconsistencies in the testimony of the three Government witnesses. At some point these discrepancies should have caused the Immigration Judge and/or the, Trial Attorney to either assist respondent in cross-examination or call a "time-out" and advise her to obtain the assistance of counsel.

At the hearing, witness Lopez testified that she was to pay respondent "$250.00." App. A at 40. Interestingly, both of the other Government witness testified contrary to this that no money was promised directly to respondent. Id. at 48 ("[n]o" mention of money), Id. at 51 ("[n]o talk of money for transportation). In contrast to her testimony at the hearing,

witness Lopez allegedly told an INS officer just a few hours before that she was to pay "$300.00" for the transportation. App. A at 22.

Lopez admits that she tried to fraudulently enter the United States, App. at 39, that a few hours before the hearing she lied to an INS agent providing him with a false name, birth date and birth place, Id. at 22, 38, and she stated at one moment that she was traveling with her uncle's wife, Id. at 40, and later that she had "no family" involved. Id. at 45.

When asked whether she could recognize the document which the Trial Attorney claimed she used to attempt to gain entry (one of respondent's daughter's immigration cards), Lopez answered "No." Id. at 39. Under a very leading examination, she soon changed this to a "Yes". Ibid. When asked "[d]o you understand" the statement made by her to an INS agent the night before the hearing, Lopez responded: "I don't recall." Id. at 43. And, even though she had only arrived in Tijuana from El Salvador within the "last week", Id. at 39, she could not recall on what day she arrived, Ibid., nor the name of the hotel she had stayed in until the day before the hearing. Id. at 41.

Given the internal contradictions in Lopez's testimony, the many recent happenings that she unbelievably could not recall, and the fact that the other two Government witnesses testified that respondent was not offered money, the Immigration Judge should have recalled Lopez and assisted respondent with a cross-examination. It is the job of the Immigration Judge to "adduce material and relevant evidence. . ." 8 C.F.R. Sec. 236.2(b). It is up to him/her to "regulate the course of the hearing." Ibid. If the applicant is not represented by counsel, "the Immigration Judge assists [the respondent] in the presentation of his case." Gordon and Rosenfield, supra, Sec. 3.20e, at 3-192. No such assistance was provided in this case. In fact, the Immigration Judge even failed to "adduce" material

evidence.

In conclusion, both the district court and the Court of Appeals were justified in concluding that petitioner's "exclusion" procedures did not comport with Fifth Amendment due process requirements in this case. In respondent's hearing it was necessary to determine (1) whether she made an "entry" into the United States, Rosenberg v. Fleuti 374 U.S. 449 (1963), and (2) whether she was "excludable." These questions must be examined and answered in a "fair" hearing at which fundamental due process protections are available.

B. The District Court Correctly Found That The Administrative Record Does Not Support A Finding That Respondent Made An "Entry"

The ruling of the district court in this case was really quite simple: "[A] meaningful departure did not occur in the instant case based upon evidence presented at the exclusion hearing. . ." Pet.App. at 21a (emphasis added); at 13a. Petitoner agrees that whether a person is making an "entry" when coming into the United States depends on an inquiry as to whether the person made an "innocent, casual and brief trip abroad. . ." Pet.Cert. at 11. This case only involves the first question: Whether "the purpose of leaving the country [was] to accomplish some object which is itself contrary to some policy reflected in our immigration laws. . ." Rosenberg v. Fleuti, supra, 374 U.S. at 462. The Government never introduced any competent evidence concerning respondent's "purpose" for "leaving the country." Even the testimony concerning her role in the events in Tijuana are unclear. Two of three Government witnesses testified, contrary to the first, that respondent was to receive no "gain"from the non-resident migrants. None of the testimony indicates that she was the driver of the car. In short, as stated by the district court, the "question of 'entry' is dispositive". Pet.App. 17a. If a finding of no "entry" is

made, the exclusion hearing cannot proceed. Ibid. And, "based upon the evidence presented at the exclusion hearing", it cannot be said that the Government met its burden of proof (see Pet. Cert. at 14) that respondent made a "meaningful departure" from the country. Pet.App. 21a. Without a "meaningful departure: there is no "entry" and the exclusion hearing should have been terminated. Ibid.

C. The Decision Of The Lower Court In This Case Is Consistent With Prior Federal Court Decisions Including Decisions Of This Court

Petitioner seeks to convince this Court that our exclusion and deportation laws must be read in the strictest possible light, completely ignoring the practical consequences of such interpretation and the prior decisions of this and other lower courts. Pet.Cert. at 8-14.

While petitioner insists on emphasizing that "all [arriving] aliens" are subject to our exclusion laws, Id. at 9 (emphasis in original), he ignores federal decisions dating back to 1924 which have provided statutory interpretations of the term "entry" to avoid irrationally harsh consequences. Rosenberg v. Fleuti, supra, 374 U.S. at 454, n.6, 455-461.

That statutory construction takes place within a constitutional framework is clearly manifested by two cases cited by petitioner. Pet.Cert. at 13-14. In Colding this Court held that a lawful permanent resident who travelled abroad as a seaman had a constitutional right to due process "without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien." Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). Upon remand in Kwong Hai Chew v. Rogers, 257 F.2d 606 (D.C.Cir. 1958), the court held that a resident immigrant may not be deprived of his status unless he has been afforded "proceedings in which the Service is the moving party, and bears the burden of proof." 257 F.2d at 606. While Secion 291, INA,

8 U.S.C. Sec. 1361, strictly interpreted provides that "any person" attempting "to enter the United States [shall have] the burden of proof. . . to establish that he is. . . not subject to exclusion", petitoner concedes that Colding, Rogers and the decisions of his agency circumvent a literal interpretation of the statute and in many cases shift the burden of proof to the Government. Pet.Cert. at 14.

Petitioner cannot premise his argument on the "plain language" of the "entry" provision of the Immigration and Nationality Act, Id. at 9, when for the past sixty years the courts (and his agency) have interpreted that provision in a manner aimed at avoiding irrationally harsh and unconstitutional consenquences. Pet.Cert. at 14; Rosenberg v. Fleuti, supra, 374 U.S. at 454, n.6. Petitioner cannot seriously interpret Colding and Rogers to mandate no more than the shifting of the burden of proof in proceedings involving returning lawful resident immigrants. Clearly, Colding requires the application of basic due process protections. While the district court in this case was concerned with the lack of due process available to respondent in her hearing, it based its decision instead on the finding that the government had not met its burden of proof establishing that a "meaningful departure" and "entry" had occured. Pet.App. at 13a. The Court of Appeals, in contrast, focused more on the lack of due process protections afforded respondent in her exclusion hearing. Id. at 6a (respondent was "prejudiced" by the nature of her hearing). The lower court decisions in this case are consistent with the previous decisions of other lower courts and of this Court.

CONCLUSION

The decision in this case turned upon its own facts and will affect few other litigants. Given the district courts' finding that "based upon the evidence presented at the exclusion hearing" a "meaningful departure did not occur", Pet.App. at 13a, this Court should find that the decison below is correct without regard for the far reaching questions sought to be raised by the petition.

Assuming that petitioner applied the Court of Appeal's decision -- that respondent should have been placed in a deportation rather than exclusion hearing -- to every returning lawful resident in the future, the administrative impact would be minimal. The Immigration and Naturalizatyion Service excludes and requires the departure of approximately one million people each year. See, e.g. INS: 1974 Annual Report, at 84; INS: 1977 Annual Report at 90, 92; INS: 1978 Annual Statistics, Tables 21-23. In contrast, only 64 lawful immigrants were required to depart in 1977 and only 26 between January and September, 1978. INS: 1978 Annual Statistics, Table 28. In 1977 only 91 "returning resident aliens" were deported on required to depart the United States. INS: 1977 Annual Report, Table 29, at 101. Clearly even a strict interpretation of the Court of Appeal's decision would have only a very minimal administrative impact.

For all of the reasons discussed above, respondent urges that the petition for certiorari be denied.

Respectfully Submitted,

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Executed this 21st day of September, 1981 in the County of Los Angeles, California.

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NO. 81-129

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE,

Petitoner

v.

MARIA ANTONIETA PLASENCIA

Respondent

APPENDIX A

Petitioner's Reply Brief

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No. 81-129

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIA ANTONIETA PLASENCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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v.

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REPLY MEMORANDUM FOR THE PETITIONER

In our petition for a writ of certiorari, we have shown that the court of appeals disregarded the express provisions of the Immigration and Nationality Act and the rulings of this Court in holding that whenever "a permanent resident alien is returning from a visit abroad and the question is whether the visit was 'meaningfully interruptive' of the alien's American residence * * * the issues of 'entry' and excludability must be litigated in deportation proceedings" (Pet. App. 6a-7a) rather than in exclusion proceedings. Respondent does not seriously attempt to defend the decision below. She cites no constitutional, statutory, or regulatory provision that purports to establish that permanent resident aliens are entitled to have the issues of "entry" and excludability determined at a deportation hearing.

1. Instead, respondent argues (Br. in Opp. 7-9) that certain procedural safeguards that are provided in the deportation context are not available in exclusion proceedings.

This is a point that we do not dispute (see Pet. 16 n.10), but we fail to see its relevance. The question in this case is not whether the procedural protections afforded at exclusion proceedings are identical to those at deportation proceedings, but whether permanent resident aliens such as respondent, who have been apprehended at the border attempting to smuggle aliens into this country, may be excluded from this country following exclusion proceedings, in accordance with the statutory scheme established by Congress. If Congress, in its wisdom, deems it advisable to make available additional procedural safeguards in the exclusion setting, that is its prerogative. But that is essentially a legislative judgment, and the court of appeals exceeded the scope of its powers by substituting its own procedures for the statutory scheme enacted by Congress. As Judge Wallace remarked in dissent, "[w]e do not have the right or power to interpolate procedural requirements from one statute to another" (Pet. App. 11a).

2. Respondent also contends (Br. in Opp. 9-15) that the hearing she received did not satisfy due process standards. This contention is without merit.

In the first place, we note that the court of appeals did not hold that respondent was denied due process; it only concluded that she was entitled to a deportation, rather than an exclusion, hearing. Moreover, respondent received notice of the charge against her, and she was given the opportunity to be represented by counsel, to object to the evidence against her, to cross-examine witnesses, to present evidence on her own behalf, and to pursue an administrative appeal. In addition, the Immigration and Naturalization Service was the moving party and bore the burden of proof at respondent's exclusion hearing. Thus, the due process requirements established in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), and *Kwong Hai Chew* v. *Rogers*, 257

F. 2d 606 (D.C. Cir. 1958), were met here.[1] Furthermore, as we have pointed out in the petition (at 7, 16-17), even if the protections available to permanent resident aliens in exclusion proceedings fall short of satisfying the requirements of due process, the proper solution is to order the INS to provide the necessary safeguards in exclusion proceedings, not to ignore the statutory framework by requiring the Service to proceed against excludable resident aliens only in deportation hearings.

3. Finally, respondent contends (Br. in Opp. 15-16) that the evidence does not support the administrative determination that she made an "entry," based on the finding that her departure—the purpose of which was to accomplish an object contrary to the policies of our immigration laws—was "meaningfully interruptive" of her permanent residence. See *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963). Here, too, we note that the court below did not address the question whether respondent had made an "entry." Rather, the court of appeals appears to have concluded that "even if a permanent resident alien does make an 'entry' after a brief visit abroad, he still cannot be subject to exclusion proceedings" (Pet. App. 4a). It is this conclusion, which is contrary to the statutory scheme established by Congress, that is at issue here.

---

[1] Both respondent (Br. in Opp. 6) and the court of appeals (Pet. App. 1a) erroneously characterize the proceedings at which respondent's "entry" and excludability were determined as "summary exclusion proceedings." This description is legally inaccurate and confuses the procedures that respondent received with the procedures applicable in certain security cases. See 8 U.S.C. 1225(c).

For the foregoing reasons and those presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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OCTOBER 1981

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Petitioner's Brief

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a permanent resident alien who has been detained at the border on a charge of aiding the illegal entry of aliens into this country is entitled to have the issues of his entry and excludability determined in deportation, rather than exclusion, proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-129

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIA ANTONIETA PLASENCIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 637 F.2d 1286. The report and recommendation of the magistrate, as adopted by the district court (Pet. App. 12a-22a), are not reported. The opinions of the Board of Immigration Appeals (Pet. App. 23a-25a, 26a) and of the immigration judge (Pet. App. 27a-30a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on November 7, 1980. A petition for rehearing was denied on February 26, 1981 (Pet. App. 32a). On May 20, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including July 22, 1981. The petition was filed on July 21, 1981, and was granted on January 11, 1982 (J.A. 39). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, are set forth at Pet. App. 34a-38a.

STATEMENT

1. Respondent, a native and citizen of El Salvador, was admitted to the United States for permanent residence in 1970 (Pet. App. 2a). On June 29, 1975, respondent was returning to this country from a two-day trip to Mexico with her husband when she was arrested at the border for attempting to smuggle six aliens into the United States (*ibid.*; *id.* at 16a). Pursuant to 8 U.S.C. 1225(b), respondent was detained pending a proceeding to determine whether she was excludable under 8 U.S.C. 1182(a)(31), which provides for the exclusion of any alien who, knowingly and for gain, aids the illegal entry or attempted entry of another alien into the United States (Pet. App. 24a, 27a-28a).

The exclusion hearing was held before an immigration judge on the following day, June 30, 1975 (J.A. 9-37). Prior to the hearing, respondent received written notice of the charge against her and of

the purpose of the hearing; the notice also specified that respondent was entitled "to be represented by counsel and to have a friend or relative present" (J.A. 8). At the commencement of the hearing, the immigration judge explained to respondent, who was accompanied by her husband, a United States citizen, that the purpose of the hearing was to determine whether respondent "ha[d] a legal right to return to the United States or whether [she] should be ordered excluded and deported" (J.A. 9). The judge ascertained that respondent understood the charge against her, and he advised respondent that she would have the opportunity to examine and object to the evidence presented against her, to cross-examine witnesses and to present evidence on her own behalf; respondent indicated that she understood her rights (J.A. 9-10).[1] In addition, the judge advised respondent of her right to "be represented by counsel or by some other qualified person," and she expressly waived that right (J.A. 9).

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[1] The immigration judge stated (J.A. 9-10):

> Q Inasmuch as you are representing yourself, I want you to fully understand your rights. You have a right to examine and object to evidence that is presented against you. I mean by this that you can look at and point out errors or make comments about any document I consider in arriving at a decision. If witnesses should testify against you, you have a right to question and to cross-examine witnesses. In addition, later on during the hearing, after Mr. Neubauer who represents the Immigration Service presents his evidence, you'll have an opportunity to respond and present documents and witnesses to show why you should not be ordered excluded and deported. Moreover, please feel free during the hearing to talk with your husband. Do you understand your rights?
>
> A [Respondent] Yes.

The evidence at the exclusion hearing showed that on June 27, 1975, respondent and her husband traveled to Tijuana, Mexico, where they met with several nonresident aliens and made preparations to facilitate the illegal entry of the aliens into the United States. Two of the aliens, Anna Lopez and Luis Polio-Medina, testified that respondent supplied them with alien registration cards that belonged to her children and agreed to transport them by automobile to Los Angeles. Lopez testified further that she had agreed to pay respondent $250 after she obtained work in this country; Polio testified that it was his understanding that other individuals had made arrangements to pay respondent $200 after his arrival in Los Angeles (Pet. App. 28a-29a; J.A. 18-24, 29-34). Respondent admitted that she had agreed to transport the aliens and that she had furnished them with her children's registration cards. She contended, however, that the only payment involved was $25 that her husband had received to purchase gasoline (Pet. App. 28a; J.A. 13-18).

At the conclusion of the hearing, the immigration judge issued an oral decision that was transcribed and made a part of the administrative record (Pet. App. 27a-30a). The judge ruled that there was "clear, convincing and unequivocal" evidence that respondent "did knowingly and for gain" assist Lopez and Polio to enter or attempt to enter the United States illegally, in violation of 8 U.S.C. 1182(a)(31) (Pet. App. 29a).[2] He also found (*id.* at 30a) that

[2] The immigration judge found, based on his observations of the witnesses' demeanor, that the testimony of Lopez and Polio was "accurate and reflect[ed] the events that actually occurred," whereas respondent's testimony was "incredible and not worthy of belief" (Pet. App. 29a). In addition, the judge observed (*id.* at 29a-30a) that even if respondent's ver-

because respondent had engaged in conduct that was contrary to a policy reflected in the immigration laws, her departure from the United States was meaningfully interruptive of her residence in this country under the doctrine of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). In accordance with this finding, the judge concluded that upon her return to the United States respondent was making an "entry," within the meaning of 8 U.S.C. 1101(a)(13), and was therefore subject to exclusion (Pet. App. 30a). The judge ordered respondent excluded and deported (*ibid.*).

After issuing his decision, the immigration judge informed respondent of her right to pursue an administrative appeal (J.A. 37). Respondent's husband filed an appeal on behalf of respondent (J.A. 38), but the Board of Immigration Appeals dismissed the appeal (Pet. App. 26a) and denied respondent's motion to reopen (*id.* at 23a-25a).[3]

2. Pursuant to 8 U.S.C. 1105a(b), respondent challenged the exclusion order in a petition for a writ of habeas corpus filed in the United States District Court for the Central District of California on March 18, 1976 (J.A. 2-7).[4] Respondent contended that the administrative determinations concerning excludability and entry were clearly erroneous, and that she

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sion of the events were credited, the $25 payment for gasoline, which she conceded, was sufficient evidence of gain to establish her excludability under 8 U.S.C. 1182(a)(31).

[3] In denying reopening, the Board rejected respondent's contentions that she was not attempting an "entry" under *Rosenberg* v. *Fleuti*, *supra*, and that she did not intelligently waive her right to counsel (Pet. App. 24a-25a).

[4] On September 19, 1975, respondent was paroled into the United States pending review of the exclusion order (J.A. 4, 6).

had been denied due process because she was not represented by counsel at the exclusion hearing and also because she was deprived of "the procedural safeguards of a deportation hearing" (J.A. 5). Respondent sought, *inter alia*, to be freed from the restraints imposed by the exclusion order or, alternatively, a remand to the Immigration and Naturalization Service "for the purpose of allowing [respondent] a de novo determination of her case in deportation proceedings" (J.A. 6).

The matter was referred to a magistrate, who concluded that in the case of a permanent resident alien the issues of entry and excludability may not be determined in an exclusion proceeding because of the alleged absence of "procedural safeguards" at exclusion proceedings (Pet. App. 13a, 20a-21a).[5] Accordingly, the magistrate recommended that the case be remanded to the INS with instructions to proceed against respondent, if at all, only in deportation proceedings (*id.* at 13a, 21a). The district court adopted the magistrate's report and recommendation (*id.* at 21a-22a, 33a).

A divided panel of the court of appeals affirmed (Pet. App. 1a-11a). The majority observed that an alien is excludable only if his coming into the United States is an "entry" within the meaning of 8 U.S.C. 1101(a)(13), and that under *Rosenberg* v. *Fleuti*, *supra*, the return of a permanent resident alien following a brief trip abroad is an "entry" only if the trip was "meaningfully interruptive" of the alien's residence in this country (Pet. App. 3a). However, the majority rejected the immigration judge's findings, made at the conclusion of the exclusion hearing,

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[5] The magistrate found that respondent had waived her right to counsel at the exclusion hearing (Pet. App. 16a).

that respondent made an "entry" and was excludable because she had attempted to smuggle aliens across the border (*ibid.*). Instead, expressing its understanding that exclusion proceedings do not satisfy the due process requirements established in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), and *Kwong Hai Chew* v. *Rogers*, 257 F.2d 606 (D.C. Cir. 1958) (Pet. App. 4a-5a),[6] the majority held that whenever "a permanent resident alien is returning from a visit abroad and the question is whether the visit was 'meaningfully interruptive' of the alien's American residence * * * the issues of 'entry' and excludability must be litigated in deportation proceedings" (*id.* at 6a-7a), which, the majority believed, "are subject to much more stringent procedural safeguards than exclusion proceedings" (*id.* at 3a).[7]

Judge Wallace dissented. Relying on *Rosenberg* v. *Fleuti*, *supra*, he reasoned that respondent's "attempt to smuggle illegal aliens across the border made her departure from the United States meaningfully interruptive of her permanent residence. She was thus

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[6] In *Kwong Hai Chew* v. *Colding*, *supra*, 344 U.S. at 602-603, this Court held that a permanent resident alien may not be excluded at the border without being given "reasonable notice of the charges against him and allowing him a hearing sufficient to meet the requirements of procedural due process." Following remand, the D.C. Circuit, in *Kwong Hai Chew* v. *Rogers*, *supra*, held that a permanent resident alien is entitled to a hearing at which the government is the moving party and has the burden of proof. See pages 20-23, *infra*.

[7] The majority noted that if the Service can meet its burden at the deportation hearing "of showing that the alien made an 'entry' and was excludable at the time of the 'entry,' then, of course, the alien is deportable pursuant to * * * 8 U.S.C. § 1251(a)(1)" (Pet. App. 7a). 8 U.S.C. 1251(a)(1) provides for the deportation of any alien who was excludable at the time of entry.

subject to exclusion on her attempt to enter the country" (Pet. App. 11a). Noting that the courts "do not have the right or power to interpolate procedural requirements from one statute to another," Judge Wallace concluded that "the district court's holding that the Immigration and Naturalization Service could proceed against * * * an alien [such as respondent] only in a deportation proceeding is incorrect" (*ibid.*).

SUMMARY OF ARGUMENT

The decisions of this Court establish that Congress exercises extremely broad powers over immigration matters and that the scope of judicial review in this area is quite limited. The decision of the court of appeals in this case exceeds the proper bounds of review by disregarding the statutory scheme established by Congress in the Immigration and Nationality Act of 1952 and by replacing that scheme with one that the court found preferable.

In the Immigration and Nationality Act, Congress preserved the traditional distinction between *exclusion* of aliens arriving at the border seeking admission, and *deportation* of aliens who have already entered this country. Under the clear terms of the Act, exclusion proceedings "shall be the sole and exclusive procedure for determining admissibility of a person to the United States * * *." 8 U.S.C. 1226(a). This procedure applies to "*all* [arriving] aliens" (8 U.S.C. 1225(a); emphasis added), whether they have lived here before or are seeking admission for the first time. Thus, as the legislative history also confirms, Congress contemplated that all persons who fall within the statutorily defined classes of inadmissible aliens may be excluded from this country following exclusion proceedings held at or near the border. See S. Rep. No. 1137 (Pt. 1), 82d Cong., 2d Sess. 29

(1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 56 (1952).

This understanding of the statutory scheme is reflected in this Court's decision in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). In that case, the Court assumed that a permanent resident alien returning to this country from abroad is generally subject to the consequences of making an "entry" and may be placed in exclusion proceedings if the immigration inspector believes that the alien is statutorily excludable. However, the Court in *Fleuti* held that Congress had carved out a small exception from the consequences of making an "entry" for those returning resident aliens whose departure is found to have been "innocent, casual, and brief" (*id.* at 461, 462). Thus, if the evidence at an exclusion hearing shows that a permanent resident alien has made a departure that is not meaningfully interruptive of his permanent residence, the hearing must be terminated, the alien must be allowed into the United States, and the Service may proceed against the alien, if at all, only in deportation proceedings. Here, however, by respondent's own account, she attempted to smuggle a group of aliens into this country, in contravention of the policies reflected in our immigration laws. Accordingly, the Service properly proceeded against her in exclusion proceedings.

The court of appeals nevertheless held that the Service must admit into this country a permanent resident alien who appears to be excludable, after which the alien may litigate the issues of entry and excludability in deportation proceedings. In reaching this result, the court relied heavily on *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), and *Kwong Hai Chew* v. *Rogers*, 257 F.2d 606 (D.C. Cir. 1958). But those decisions establish only that a permanent resident alien subjected to exclusion proceedings fol-

lowing a trip abroad is entitled, as a matter of due process, to certain procedural protections, including the requirement that the government be the moving party and bear the burden of proof. Nothing in those cases suggests that the INS may not determine the excludability of a returning permanent resident alien in exclusion proceedings held at the border.

Moreover, the decision below is premised on the mistaken belief that permanent resident aliens in exclusion proceedings do not receive the procedural protections mandated by *Kwong Hai Chew* v. *Colding*, *supra*, and *Kwong Hai Chew* v. *Rogers*, *supra*. In fact, however, these protections *are* afforded in exclusion proceedings to aliens with colorable claims to permanent resident status. Furthermore, additional procedural safeguards afforded to such aliens in exclusion proceedings are similar in most significant respects to those available at deportation proceedings.

At bottom, however, the issue in this case is not whether exclusion hearing procedures are or should be identical to those at deportation hearings, or even whether the procedures available to permanent resident aliens in exclusion hearings comport with due process. Rather, the question is whether permanent resident aliens such as respondent, who have been apprehended at the border attempting to smuggle illegal aliens into this country, may be excluded from the United States following exclusion proceedings, as Congress provided in the Immigration and Nationality Act. Thus, if the procedures afforded to permanent resident aliens fail to satisfy due process, the proper remedy is to order the INS to provide the necessary safeguards *in exclusion proceedings*, as the courts did in *Colding* and *Rogers*, not to amend the statutory scheme by requiring the Service to proceed against excludable resident aliens only in deportation hearings.

ARGUMENT

A PERMANENT RESIDENT ALIEN WHO, AFTER A VISIT ABROAD, HAS BEEN DETAINED AT THE BORDER ON CHARGES OF VIOLATING THE IMMIGRATION LAWS IS NOT ENTITLED TO HAVE THE ISSUES OF HIS ENTRY AND EXCLUDABILITY DETERMINED IN DEPORTATION, RATHER THAN EXCLUSION, PROCEEDINGS

A. Introduction

It is well settled that Congress exercises broad powers over immigration matters, including the admission of aliens into the United States, and that the scope of judicial inquiry in this area is quite limited. In *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (footnote omitted), the Court summarized the controlling principles:

> This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909); accord, *Kleindienst* v. *Mandel*, 408 U.S. 753, 766, (1972). Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953); see, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Lem Moon Sing* v. *United States*, 158 U.S. 538 (1895); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). Our recent decisions have not departed from this long-established rule. Just last Term, for example, the Court had occasion to note that "the power over aliens is of a political character and therefore subject only to narrow judicial review." *Hamp-*

> *ton* v. *Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976), citing *Fong Yue Ting* v. *United States*, *supra*, at 713; accord, *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976). And we observed recently that in the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.*, at 80.

With these principles in mind, we shall describe the statutory provisions that form the background for the ruling under review.

In Section 212(a) of the Immigration and Nationality Act of 1952, Congress has provided that certain classes of aliens "shall be excluded from admission into the United States." 8 U.S.C. 1182(a). Among the classes of excludable aliens described in the Act are those who have, at any time, knowingly and for gain, aided or abetted any other alien to try to enter the United States in violation of law. 8 U.S.C. 1182(a)(31).

The procedures governing the exclusion of inadmissible aliens are set forth in Sections 235 and 236 of the Act, 8 U.S.C. 1225 and 1226. Under Section 235, every alien arriving at a United States port and seeking admission or readmission into this country must be examined by an officer of the Immigration and Naturalization Service to determine whether the alien shall be permitted to enter. If the alien does not appear to the immigration officer "to be clearly and beyond a doubt entitled to land," the alien may be detained for further inquiry before a "special inquiry officer," or immigration judge. 8 U.S.C. 1225(b). The proceeding conducted by the immigration judge to decide whether the alien "shall be allowed to enter or shall be excluded and deported" (8 U.S.C. 1226(a)) is generally referred to as an exclusion hearing.

The foregoing procedures apply whenever an alien seeks to make an "entry" into the United States, whether or not the alien has resided here before or is seeking admission for the first time. Congress has defined "entry" broadly in the Act to mean "any coming of an alien into the United States, from a foreign port or place or from an outlying possession * * *." 8 U.S.C. 1101(a)(13). In an exception to this definition, however, Congress has provided that

> an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary * * *.

8 U.S.C. 1101(a)(13). Interpreting this exception to the definition of "entry," the Court held in *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963), that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return."

In this case, respondent, a permanent resident alien, was returning to the United States from a brief trip to Mexico when she was arrested at the border for attempting to smuggle illegal aliens into this country. Before concluding whether to admit respondent or exclude her at the border, the immigration authorities had to determine whether respondent could be subjected "to the consequences of an 'entry,' "

i.e., whether respondent's excursion was "innocent, casual, and brief" (*Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462) and, if so, whether respondent's conduct subjected her to exclusion under 8 U.S.C. 1182(a)(31). The question presented here is whether the determinations by the Immigration and Naturalization Service concerning the issues of entry and excludability in the case of a permanent resident alien such as respondent, who is stopped at the border for allegedly violating the immigration laws, are properly made at an exclusion hearing, as provided by Congress in the Immigration and Nationality Act, or whether, as the court of appeals held, a permanent resident alien is entitled to have these issues determined at a deportation proceeding.

As we show in this brief, the decision of the court of appeals ignores the statutory scheme established by Congress in the exercise of its plenary authority over immigration matters. Moreover, the decision below is based on a serious misunderstanding concerning the procedural safeguards available to permanent resident aliens at exclusion hearings. Because the court of appeals erred in substituting its own preferred procedures for the procedural framework erected by Congress in the Act, the judgment below should be reversed.

B. The Immigration Act Provides That All Aliens Seeking Entry Are Subject To Exclusion Proceedings

In enacting the Immigration and Nationality Act of 1952, Congress recognized that our immigration laws have long made a distinction between aliens who arrive at the border seeking admission and aliens who are within the United States after an entry, regardless of its legality. As the Court noted in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958)

(footnotes omitted), the Act preserves this distinction by establishing two separate schemes:

> Chapter 4 subjects those seeking admission to "exclusion proceedings" to determine whether they "shall be allowed to enter or shall be excluded and deported." 66 Stat. 200, 8 U.S.C. § 1226(a). On the other hand, Chapter 5 concerns itself with aliens who have already entered the United States and are subject to "expulsion," as distinguished from "exclusion," if they fall within certain "general classes of deportable aliens." 66 Stat. 204, 8 U.S.C. § 1251. Proceedings for expulsion under Chapter 5 are commonly referred to as "deportation proceedings."

See *Yuen Sang Low* v. *Attorney General of United States*, 479 F.2d 820, 821-823 (9th Cir. 1973); 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* ¶ 3.18, at 3-177 to 3-179 (1981). The decision below disregards this basic distinction.

The plain language of the Immigration and Nationality Act establishes that the admissibility of an alien into this country is an issue that may be resolved only in exclusion proceedings. Section 235 of the Act provides for the inspection at United States ports of entry of "*all* [arriving] aliens," including those aliens "seeking admission *or readmission* to or the privilege of passing through" this country. 8 U.S.C. 1225(a) (emphasis added). Every alien who, upon inspection, does not appear to the immigration authorities "to be clearly and beyond a doubt entitled to land" is subject to detention pending an exclusion hearing before a "special inquiry officer," or immigration judge. 8 U.S.C. 1225(b). Section 236 of the Act explicitly provides that "[p]roceedings before a special inquiry officer under this section * * * *shall be the sole and exclusive procedure*

for determining admissibility of a person to the United States * * *." 8 U.S.C. 1226(a) (emphasis added).

This unambiguous statutory language reflects Congress' intent to subject to exclusion proceedings all aliens who are stopped at the border and are believed to be excludable, regardless of whether they are coming into this country for the first time or are applying for readmission. In contrast to the exclusion provisions of the Act, which apply to aliens at the threshold of entry, the sections of the Act that deal with deportation consistently refer to aliens "in" or "within" the United States. See, *e.g.*, 8 U.S.C. 1251(a), (f), 1253(a), (h).[8] The structure

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[8] The distinction drawn in the Act between already admitted aliens, who are subject to deportation, and aliens, such as respondent, who are seeking admission, is illustrated by the decision in *Leng May Ma* v. *Barber*, *supra*. There the Court concluded that an excludable alien who had been paroled into the United States was not eligible for the discretionary relief of withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), because the alien was not "within" the United States as that term is used in Section 243(h). After noting that the Act provides, in separate chapters, different procedures for exclusion and deportation (see page 15, *supra*), the Court remarked that it consistently had held that "the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." 357 U.S. at 188. In view of Congress' express provision in the parole statute, 8 U.S.C. 1182(d)(5) (which codified the administrative practice under which aliens had been paroled), that parole "shall not be regarded as an admission of the alien" and that after the alien's return to custody his case "shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States," the Court concluded that the legal status of an alien paroled into this country is no different than that of an alien who has been

of the Act—providing for exclusion at the border of all excludable aliens and for deportation of aliens who have already entered the United States—shows that Congress intended the question of an alien's admissibility to be determined in exclusion, not in deportation, proceedings.

The legislative history of the Act leaves no room for doubt on this point. In identical language, the reports of the Senate and House committees state:

> The special inquiry officer is empowered to determine whether an alien detained for further inquiry shall be excluded and deported or shall be allowed to enter after he has given the alien a hearing. *The procedure established in the bill is made the sole and exclusive procedure for determining the admissibility of a person to the United States.*

S. Rep. No. 1137 (Pt. 1), 82d Cong., 2d Sess. 29 (1952) (emphasis added); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 56 (1952) (emphasis added).

The decisions of this Court confirm that Congress intended the admissibility of permanent resident aliens to be determined in exclusion proceedings. Thus, in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 213 (1953), the Court observed that "[f]or purposes of the immigration laws, * * * the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws."[9]

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detained. 357 U.S. at 188. See *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925); *Yuen Sang Low* v. *Attorney General of United States*, *supra*, 479 F.2d at 821-823.

[9] To be sure, as the Court noted in *Shaughnessy* v. *Mezei*, *supra*, 345 U.S. at 213, "a lawful resident alien may not cap-

Similarly, in *Rosenberg* v. *Fleuti*, *supra*, the Court assumed that resident aliens such as Fleuti were subject to exclusion proceedings, observing that "Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it * * *." 374 U.S. at 461. As we have already observed (at page 13, *supra*), the Court in *Fleuti* interpreted the intent exception to the definition of "entry" in 8 U.S.C. 1101(a)(13) "as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence" (374 U.S. at 462), and it noted that a resident alien returning from an innocent, casual and brief trip abroad may not have intended his trip to be "meaningfully interruptive" of his resident alien status (*id.* at 461). In such a situation, the Court concluded, a resident alien may not be regarded as making an "entry" upon his return to this country. In support of this conclusion, the Court expressed the view that Congress did not intend a lawful resident alien who has stepped across the border and, in effect, stepped right back to be subjected "to exclusion for a condition for which he could not have been deported had he remained in the country * * *." *Id.* at 460. However, the Court was careful to point out that "if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it

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tiously be deprived of his constitutional rights to procedural due process." But whether the particular procedures available at exclusion hearings provide the process that is "due" lawful resident aliens presents a question quite distinct from whether such aliens may not be subjected to exclusion proceedings at all.

would appear that the interruption of residence thereby occurring would properly be regarded as meaningful" (*id.* at 462), so that the alien would be making an "entry" on his return and would be subject to exclusion at the border.

Thus, contrary to the decision below, there was nothing "circular[]" (Pet. App. 3a) about the Immigration and Naturalization Service's practice in this case of determining the issues of respondent's entry and excludability in exclusion proceedings, nor was the Service attempting "to use exclusion proceedings to circumvent the deportation proceeding requirements" (*id.* at 5a-6a). Rather, the Service was merely complying with the procedures mandated by Congress. Indeed, if there is anything "circular" in this case, it is the roundabout procedure required by the court of appeals (*id.* at 7a), which held that a permanent resident alien is not subject to exclusion at the border but must be admitted into the United States, after which he may be deported pursuant to 8 U.S.C. 1251(a)(1) if the Service succeeds in showing, at a deportation hearing, that he made an entry and was excludable at the time of the entry.

Of course, if the evidence at an exclusion hearing shows that a permanent resident alien has made an innocent, casual and brief departure that is not "meaningfully interruptive" of his permanent residence under *Rosenberg* v. *Fleuti*, *supra*, then the exclusion hearing must be terminated because the alien's coming into the country would not be an "entry" within the meaning of the Act. In such a situation, the Service could proceed against the alien only in a deportation hearing. See note 12, *infra*. But the decision below would preclude the INS from *initiating* exclusion proceedings against any permanent

resident alien who raises a *Fleuti* claim, no matter how insubstantial.[10]

In short, the decision of the court of appeals is inconsistent with the intent of Congress as reflected in the language and history of the Act and as understood in this Court's decisions. The decision below is also based on an erroneous reading of the cases holding that a lawful resident alien is entitled to due process before he may be excluded at the border.

C. The Decisions That Establish A Permanent Resident Alien's Right To Due Process In The Exclusion Setting Do Not Support A Right To A Deportation Hearing Instead Of The Statutorily-Mandated Exclusion Hearing

In ruling that respondent was entitled to a deportation hearing, the court of appeals relied heavily on *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), and *Kwong Hai Chew* v. *Rogers*, 257 F.2d 606 (D.C. Cir. 1958), which, the court of appeals believed, "strongly support[] the view that even if a permanent resident alien does make an 'entry' after a brief visit abroad, he still cannot be subject to exclusion proceedings" (Pet. App. 4a). The court's reliance on the *Kwong Hai Chew* cases is misplaced. Nothing in those cases suggests that the Immigration and Naturalization Service may never determine the excludability of a lawful resident alien in exclusion proceedings held at the border.

In *Kwong Hai Chew* v. *Colding*, *supra*, this Court held that a lawful permanent resident alien who traveled abroad as a seaman on a vessel of American

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[10] Indeed, the court of appeals' decision may be read as barring the INS from proceeding against *any* returning resident alien, even one making an entry. See this page & note 16, *infra*.

registry had a constitutional right to due process "without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien." 344 U.S. at 600. The Court noted that a permanent resident alien who remains within the United States "is a person within the protection of the Fifth Amendment * * * [and] may not be deprived of his life, liberty or property without due process of law." *Id.* at 596 (footnote omitted). See, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976). Although it acknowledged that "a resident alien's ultimate right to remain in the United States [may be] subject to alteration by statute * * * because of a voyage undertaken by him to foreign ports," the Court in *Colding* concluded that "it does not follow that he is thereby deprived of his constitutional right to procedural due process." 344 U.S. at 601.[11] Accordingly, the Court interpreted the administrative regulations authorizing exclusion without a hearing in certain security cases to be inapplicable to lawful resident aliens, who are entitled to the protections of due process. *Id.* at 598-599. Such aliens, the Court ruled, must be given notice of the charges against them and an

[11] While "assimilat[ing]" Kwong Hai Chew's status "to that of an alien continuously residing and physically present in the United States" (344 U.S. at 596), the Court made clear that its decision to treat Kwong Hai Chew as if he had not left the United States was "[f]or purposes of his constitutional right to due process" only. *Ibid.*; *id.* at 600. There is no intimation that Congress could not, for immigration purposes, treat lawful resident aliens seeking reentry differently than lawful resident aliens who have not journeyed outside the United States. Certainly, nothing in the equal protection principles embodied in the Due Process Clause requires that persons in these differently situated groups be treated alike.

opportunity to be heard in opposition before their permanent exclusion and consequent deportation may be ordered. *Id.* at 597-598, 602-603.

This Court's decisions subsequent to *Colding* demonstrate that that case cannot be construed as requiring the INS to proceed against lawful resident aliens only in deportation, rather than exclusion, proceedings. For example, in *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 460 (emphasis added), this Court described *Colding* as establishing that a "returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to *exclude* him." Similarly, in *Shaughnessy* v. *Mezei*, *supra*, 345 U.S. at 213, the Court stated that *Colding* stood for the proposition—which we do not dispute—that "under some circumstances temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard."

Kwong Hai Chew v. *Rogers*, *supra*, similarly provides no support for the decision below. In its brief per curiam decision in *Rogers*, the District of Columbia Circuit held that a resident alien may not be deprived of his status unless he has been afforded "proceedings in which the Service is the moving party, and bears the burden of proof." 257 F.2d at 606. Thus, *Colding* and *Rogers* simply hold that a permanent resident alien is entitled as a matter of due process to certain procedural safeguards before he may be excluded at the border following a journey outside the United States.[12] Those cases provide no

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[12] The court of appeals erroneously concluded (Pet. App. 5a) that the decision in *Maldonado-Sandoval* v. *INS*, 518 F.2d 278 (9th Cir. 1975), "stands for the same principle established in *Kwong Hai Chew*: a permanent resident alien does not

basis for concluding that a lawful resident alien may not be subject to exclusion proceedings—so long as the exclusion proceedings comport with due process requirements.

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lose the procedural protection to which he is otherwise entitled simply by making a brief journey abroad." In *Maldonado-Sandoval*, a permanent resident alien challenged his exclusion order on the ground that his return to the United States following a brief trip to Mexico did not constitute an "entry." Based on the evidence at the exclusion proceeding, the court of appeals found that the alien's innocent, casual and brief visit abroad was not "meaningfully interruptive" of his permanent residence and that therefore the exclusion order could not stand (*id.* at 281; see also, *e.g.*, *Zimmerman* v. *Lehmann*, 339 F.2d 943, 947-949 (7th Cir.), cert. denied, 381 U.S. 925 (1965)). The court stated (518 F.2d at 281; emphasis added) that "[w]hen evidence appears, *during an exclusion proceeding*, that the alien has been theretofore granted residence status and is seeking to return to the United States after a brief visit outside the United States, the exclusion proceeding shall be terminated." In other words, the court held that if the evidence at an exclusion hearing establishes that a permanent resident alien has made a *Fleuti*-type departure, *i.e.*, one that is "innocent, casual, and brief," and thus not "meaningfully interruptive" of his permanent resident status (*Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462), then the hearing must be terminated because the alien's coming into this country would not qualify as an "entry" under the intent exception in 8 U.S.C. 1101(a)(13). The court in *Maldonado-Sandoval* did not hold that the Service is precluded from instituting exclusion proceedings whenever a parmanent resident alien simply *raises* a *Fleuti* claim. See *Matter of Leal*, 15 I. & N. Dec. 477, 478-479 (1975). As Judge Wallace noted below in dissent (Pet. App. 10a), this case is clearly distinguishable from *Maldonado-Sandoval* because the evidence at the exclusion proceeding showed that respondent's trip was not innocent, casual and brief, but was intended to accomplish a purpose contrary to the immigration laws.

D. The Procedures Available To Lawful Resident Aliens At Exclusion Proceedings Are Substantially Similar To Those Available At Deportation Proceedings And Satisfy The Requirements Of Due Process

The decision of the court of appeals is premised on the belief that, unlike deportation hearings, exclusion proceedings do not afford resident aliens the due process protections of "a hearing at which the government [is] the moving party and ha[s] the burden of proof" (Pet. App. 5a, citing *Kwong Hai Chew* v. *Rogers*, *supra*). Thus, even though *Kwong Hai Chew* v. *Rogers*, *supra*, held that the INS must provide lawful resident aliens with a hearing procedure that comports with due process, the court below assumed that the Service has ignored the mandate of that decision for more than 20 years. In order to remedy this assumed defect, the court held that the INS may proceed against permanent resident aliens only in deportation hearings, where the government is the moving party and has the burden of proof. The assumption on which the decision below is based, however, is entirely incorrect.

It is true that Section 291 of the Act, 8 U.S.C. 1361, generally provides that the burden of proving admissibility in an exclusion hearing is on the alien applying for admission. However, following the D.C. Circuit's decision in *Rogers*, the Board of Immigration Appeals has held, in a series of cases, that where an alien has a colorable claim to lawful permanent resident status[13] at the time he attempts to enter,

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[13] The alien may establish such a claim to lawful permanent resident status by producing his alien registration receipt card (INS Form I-151). In this case, respondent's Form I-151, which showed that she entered the United States on March 6, 1970, as a permanent resident, was made part of the administrative record (J.A. 11; see R. 77 ("R." refers to the record in the court of appeals)).

he is entitled to a hearing at which the government bears the burden of proof. See, *e.g.*, *Matter of Becerra-Miranda*, 12 I. & N. Dec. 358, 366 (1967); *Matter of Kane*, 15 I. & N. Dec. 258, 264 (1975); *Matter of Sosa*, 15 I. & N. Dec. 572, 573 (1976); *Matter of Salazar*, Interim Decision No. 2741 (B.I.A. Nov. 9, 1979), slip op. 3-4. See also 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, *supra*, ¶ 3.18, at 3-181 & n.18. As a practical matter, therefore, the burden of proof requirement of Section 291 has no application in the case of a permanent resident alien. Thus, contrary to the impression of the court below, resident aliens in exclusion hearings do receive the due process protections mandated by *Rogers*. In the present case, the decision of the immigration judge plainly indicates that the mandate of *Rogers* was followed. The judge found that the Service had established respondent's excludability "by evidence that is clear, convincing and unequivocal" (Pet. App. 29a), the same standard that is applied in deportation cases. See *Woodby* v. *INS*, 385 U.S. 276 (1966).

Moreover, as the record of this case demonstrates, aliens in exclusion proceedings are afforded numerous other procedural protections, similar to those available in deportation proceedings. Thus, pursuant to statute (8 U.S.C. 1226), respondent's exclusion hearing was held before an impartial immigration judge, the same official who presides over deportation proceedings (see 8 U.S.C. 1252(b)). Furthermore, in accordance with the regulations in effect at the time of respondent's hearing (8 C.F.R. 236.2(a) (1975)), respondent was notified of the nature and purpose of the hearing, of the right to be represented by counsel, and of the opportunity to examine and object to evidence against her, to cross-examine witnesses and

to present evidence on her own behalf (J.A. 9-10).[14] The hearing was recorded verbatim (see 8 U.S.C. 1226; 8 C.F.R. 236.2(e)) and was conducted in Spanish through an official interpreter (J.A. 9). In addition, at the conclusion of the hearing, the immigration judge issued a decision (Pet. App. 27a-30a) setting forth a discussion of the evidence and his findings as to excludability. See 8 C.F.R. 236.3 (1975); 8 C.F.R. 236.5(a). Finally, respondent was advised of her right to take an administrative appeal (J.A. 37), and she availed herself of that right (J.A. 38).

Thus, insofar as aliens with colorable claims to permanent resident status are concerned, the procedural protections available at exclusion hearings are similar in most significant respects to those available at deportation hearings. See 8 C.F.R. Part 242. The court of appeals therefore erred in concluding that the Service attempted "to use exclusion proceedings to circumvent the deportation proceeding requirements" (Pet. App. 5a-6a).

To be sure, the protections available at exclusion and deportation hearings are not identical. For example, while the burden of proof is on the Service rather than on the permanent resident alien in both types of proceedings, in exclusion hearings the alien must initially come forward with evidence establishing a colorable claim to permanent resident status before the Service may be required to bear the burden of establishing the alien's excludability (see pages

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[14] Since the date of respondent's hearing, the Service's regulations have been amended to provide that the immigration judge at an exclusion hearing must advise the alien of the availability of qualified free legal services programs. 8 C.F.R. 236.2(a). See 44 Fed. Reg. 4651-4655 (1979).

24-25, *supra*), whereas at a deportation proceeding the alien may simply stand mute and put the Service to its proof. The reason for requiring the alien to present a colorable claim of permanent residence in the exclusion context is obvious, since the constitutional requirement of due process does not extend to an alien who is on the threshold of initial entry into the United States. With regard to such an alien, "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Shaughnessy* v. *Mezei*, *supra*, 345 U.S. at 212, quoting *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950).

In addition, although in both exclusion and deportation proceedings the alien is entitled to notice of the charge against him (compare 8 C.F.R. 235.6(a), 236.2(a) with 8 C.F.R. 242.1(b)), the Board of Immigration Appeals has held that an alien may be found excludable in exclusion proceedings on a ground not specified in the prehearing notice of charges "as long as the applicant is informed of the issues confronting him at some point in the hearing, and he is given a reasonable opportunity to meet them." *Matter of Salazar*, *supra*, slip op. 3. That can be no ground for complaint here, however, since respondent received written notice of the charge prior to the commencement of her exclusion hearing.[15]

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[15] Respondent points out (Br. in Opp. 7) that an alien in a deportation proceeding ordinarily receives notice of the charges at least seven days before the scheduled hearing date (8 C.F.R. 242.1(b)) and that reasonable continuances may be granted at the alien's request (8 C.F.R. 242.13), whereas exclusion hearings may be conducted on shorter notice and no regulation specifically authorizes the granting of continuances. But in this case respondent never sought a continuance, and there is no reason to assume that, if respondent had pre-

In any event, the question in this case is not whether the procedural protections afforded at exclusion proceedings should be identical to those at deportation proceedings, but whether permanent resident aliens such as respondent, who have been apprehended at the border attempting to smuggle aliens into this country, may be excluded from this country following exclusion proceedings, in accordance with the statutory scheme established by Congress. Whether different procedures should be adopted in the exclusion setting is for Congress, and not the courts, to decide.

E. Even If Exclusion Proceedings Do Not Satisfy Due Process, The Court of Appeals Erred In Concluding That The Proper Remedy Is To Proceed Against Permanent Resident Aliens Only In Deportation Proceedings

As this Court made clear in *Kwong Hai Chew* v. *Colding*, *supra*, at least with respect to permanent resident aliens, whatever procedures Congress provides in the exclusion setting must comport with the requirements of due process. We note in this regard that respondent's principal contention (Br. in Opp. 9-15) is that she was deprived of her right to due process at her exclusion hearing. But if the protections available to permanent resident aliens in exclusion proceedings fall short of satisfying the requirements of due process, the proper solution is to order the INS to provide the necessary safeguards *in exclusion proceedings*, as the courts did in *Colding* and *Rogers*, not to ignore the statutory framework by requiring the Service to proceed against excludable resident aliens only in deportation hearings.

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sented valid grounds for one, the immigration judge would have denied such a request.

The court of appeals remarked that "[t]he Service should not be unduly burdened by our holding" (Pet. App. 6a). But the decision below, unless overturned, will have a substantial impact on the operations of the INS. Under the court of appeals' reasoning, no excludable permanent resident aliens would be subject to exclusion proceedings, regardless of whether they are making an "entry" (see Pet. App. 4a).[16] The decision would thus require the Service to admit every alien with a claim to lawful permanent resident status, notwithstanding the determination by the immigration inspector pursuant to 8 U.S.C. 1225(b) that the alien is probably excludable for engaging in such violations as smuggling drugs or aliens.[17] Once such aliens are admitted into this coun-

[16] The court of appeals purported to limit its decision to situations in which a permanent resident alien returning from a visit abroad claims that the visit was not "meaningfully interruptive" of his permanent residence under *Rosenberg* v. *Fleuti*, *supra* (Pet. App. 6a-7a). But when viewed in the factual context of this case, the court's purported limitation is meaningless. In *Fleuti*, the Court stated that if the purpose of an alien's departure from the United States was to accomplish an object "contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." 374 U.S. at 462. If respondent, who was apprehended while attempting to smuggle aliens into this country, could avoid being placed in exclusion hearings simply by claiming that her departure was not meaningfully interruptive, despite the fact that the purpose of her trip abroad unquestionably was to violate the immigration laws, then it would appear that any excludable permanent resident alien who is stopped at the border could similarly insist on a "right" to deportation proceedings, whether or not he was making an "entry."

[17] Under 8 U.S.C. 1182(d)(5), it is not possible for the Service to parole an alien into the United States (in contrast to admitting the alien, as required by the court below) and

try, they will have an opportunity to abscond prior to deportation proceedings. In those cases where the Service may have a basis for believing that the alien is not likely to appear at the deportation hearing, the Service will have to expend resources in providing for a bond or detention (8 U.S.C. 1252(a)).[18]

Another consequence of the decision below would be that resident aliens who are found to have been excludable at the time of entry could nevertheless seek one or more of the numerous forms of substantive relief that Congress has made available in the deportation context but has chosen to withhold in the exclusion context. In *Maldonado-Sandoval* v. *INS*, 518 F.2d 278, 280 n.3 (9th Cir. 1975), the court observed that various forms of discretionary relief are available in deportation, but not exclusion, proceedings. Among the privileges available under the deportation provisions of the Act are designation

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then place the alien in deportation proceedings. That statute provides that the Attorney General has the discretion temporarily to parole any alien into the United States "for emergent reasons or for reasons deemed strictly in the public interest * * *." As noted earlier (see note 8, *supra*), however, Congress has made clear that the parole of an alien "shall not be regarded as an admission of the alien * * *." Thus, an alien paroled into this country may not be placed in deportation proceedings. See *Leng May Ma* v. *Barber*, *supra*; *Yuen Sang Low* v. *Attorney General of the United States*, *supra*.

[18] If, on the other hand, an alien coming from an adjacent country were subject to exclusion proceedings, the Service could simply advise him to return to that country and reappear at the border station on the date of the exclusion hearing. See 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, *supra*, ¶ 3.17b, at 3-170. See also *INS Operating Instructions*, ¶ 235.6b, at 2344 (1979).

of the country of deportation (8 U.S.C. 1253(a)); withholding of deportation (8 U.S.C. 1253(h)); suspension of deportation or voluntary departure (8 U.S.C. 1254(a)(1), (e)); and adjustment of status (8 U.S.C. 1255). Whether to allow relief of this kind to one category of aliens and not another is clearly a decision for Congress, not the courts, to make. Absent discrimination based on suspect criteria, such a decision may not be disturbed unless the court finds that the statutory " 'classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.' " *Harris* v. *McRae*, 448 U.S. 297, 322 (1980), quoting *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). Although the court of appeals did not conclude that it is irrational for Congress to treat lawful resident aliens seeking reentry differently for immigration purposes than resident aliens who have remained in this country, the effect of the decision below is to interfere with Congress' judgment by permitting excludable resident aliens, who would have been statutorily ineligible for these privileges in exclusion proceedings, to seek one or more of these forms of discretionary relief. The availability of these forms of relief will require the expenditure of substantial additional resources and will inevitably result in delays in an already overburdened administrative system. In addition, requests for such relief, and appeals from the denial of relief, will provide excludable aliens with the opportunity to extend further their unlawful stay in this country.

In *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981), this Court held that the Ninth Circuit had "improvidently encroached on the authority which the [Immigration] Act confers on the Attorney General and his delegates." The instant case does not involve a mere failure to defer to the Attorney General's in-

terpretation of the Act. Here, despite the absence of any constitutional basis for its decision, the Ninth Circuit has disregarded the statutory scheme established by Congress and replaced it with a different scheme that it found preferable. This the court was not empowered to do. See *Steadman* v. *SEC*, 450 U.S. 91, 104 (1981); *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 284 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, *Petitioner*

v.

MARIA ANTONIETA PLASENCIA

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a returning lawful permanent resident, after a brief visit abroad, shall have her right to be in the United States heard within the procedural safeguards now offered in deportation proceedings, as opposed to summary exclusion proceedings.

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STATEMENT OF FACTS

Respondent, MARIA PLASENCIA, is a native of El Salvador. She was admitted to the United States for lawful permanent residence in 1970 after her marriage to a U.S. citizen. In 1975, returning from a brief visit to Mexico, she was detained at the border and charged with attempting to smuggle six aliens into the country. She declined to obtain counsel. The next day exclusion proceedings were commenced at the border and she was ordered excluded from the United States pursuant to Section 212(a)(31) of the Immigration and Nationality Act of 1952 (hereinafter the "Act") 8 U.S.C. § 1182(a)(31), which makes the smuggling of aliens for gain an excludable offense. In those proceedings, Plasencia had the burden of proving that she was entitled to enter the country pursuant to 8 U.S.C. § 1361. The Immigration Judge regarded it appropriate in the exclusion proceedings to determine whether Plascencia's visit to Mexico had been a meaningful departure within the holding of *Rosenberg* v. *Fleuti*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed. 2 1000 (1963). He found that she was guilty of smuggling aliens and that she was subject to summary exclusion proceedings.

PROCEDURAL FACTS

Respondent was ordered excluded from the United States on June 30, 1975. The Board of Immigration Appeals, (hereinafter "BIA") affirmed the Order of Exclusion on October 23, 1975. The BIA thereafter affirmed their decision in denying Respondent's Motion To Reopen the Exclusion Proceedings on February 11, 1976.

Respondent thereafter sought review after exhaustion of the administrative remedies by the sole means available through a Petition For Writ of Habeas Corpus. 8 U.S.C. § 1105a(b). On March 21, 1978, The U.S. District Court for the Central District of California denied the petition an instead vacated the Order of the BIA remanding the case for further hearing in deportation rather than exclusion proceedings.

The Ninth Circuit United States Court of Appeals affirmed the decision of the District Court on November 7, 1980, holding that in the facts of Respondent's case, that a deportation hearing would have been proper. Rehearing was denied. This Court granted the petition by the United States for Writ of Certiorari to review this case on February 11, 1982.

SUMMARY OF ARGUMENT

It is unfair and in violation of procedural due process for our Immigration authorities to strip a permanent resident alien of her lawful status to return and reside in this country through the use of Summary Exclusion proceedings, especially when the propriety of using that summary procedure against a permanent resident alien returning from a brief visit abroad is uncertain. The fairness of this procedure becomes manifest injustice when the issues relevant to determining if the permanent resident alien should be subject to exclusion proceedings are identical to those relevant to the alien's admissibility, and are both litigated simultaneously in a summary proceeding. The petitioner's logic in this regard is circular and would suggest in this case that the ends should justify the means.

The real issue is one of procedural sufficiency. Is it constitutionally fair to deny a permanent resident alien after a brief visit abroad of procedural safeguards which insure adequate notice of the charges against her and of the evidence which the Immigration Service will present. Past cases based upon similar facts and circumstances have limited the Immigration Services' harsh and unfair application of strict re-entry rules against returning permanent resident aliens. In this case, the District Court and Court of Appeals, below have determined that the degree of due process afforded to this respondent was insufficient.

It is not contrary to the intent of Congress as expressed in our Immigration laws to deny permanent resident aliens of basic

due process in defense of their lawful status to reside in this country permanently. The use of exclusion proceedings against returning permanent resident aliens after a brief visit abroad accomplished this result upon the sole distinction that they were apprehended at our borders.

I

A PERMANENT RESIDENT ALIEN RETURNING FROM A TRIP ABROAD IS ENTITLED TO HAVE ISSUES OF ENTRY AND EXCLUDABILITY DETERMINED IN PROCEEDINGS WHICH AFFORD A DEGREE OF PROCEDURAL DUE PROCESS COMMENSURATE WITH THAT NOW OFFERED IN DEPORTATION PROCEEDINGS.

A. Permanent Resident Aliens Are Entitled To A High Degree Of Procedural Due Process In Proceedings Which Concern Their Continued Residence Status.

Fundamental fairness requires that permanent resident aliens receive a full and fair hearing before deportation. This Court has long recognized that resident aliens attach great value to the privilege of residing in the United States. In *Bridges* v. *Wixon*, 326 U.S. 135 (1945), the Court noted that "Meticulous care must be exercised lest the procedure by which (a resident alien is) deprived of that liberty not meet the essential standards of fairness." 326 U.S. at 154. In *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), this court held that "Although Congress may prescribe conditions for (a resident alien's) expulsion and deportation, not even Congress may expel him without allowing him a full and fair opportunity to be heard." 344 U.S. at 590. The Sixth Circuit, in *Aguilera-Enriquez* v. *INS*, 516 F.2d 565 (6th Cir., 1975), stated that "The courts have been vigilant to ensure that aliens receive the protections Congress has given them before they may be banished from our shores." 516 F.2d at 568.

The degree of due process necessary to constitute a "full and fair hearing" remains an open question. At the present time,

aliens subject to expulsion enjoy at least seven days notice of the charges which form the basis of the deportation. 8 U.S.C. § 1252(b); 8 C.F.R. 242.1(b). The purpose of notice is to allow the alien time to prepare an adequate defense. *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir., 1975); *Cheung* v. *INS*, 418 F.2d 460 (D.C. Cir., 1969). In addition, aliens subject to expulsion have the right to review prior statements of Government witnesses. This preserves the right of cross-examination in an adversarial expulsion proceeding. *Carlisle* v. *Rogers*, 262 F.2d 19 (D.C. Cir., 1959). An alien has the right to be represented by counsel at his own expense, but "an alien can knowlingly, intelligently, and voluntarily waive his right to counsel." *Ramirez* v. *INS*, 550 F.2d 560, 565 (9th Cir., 1977).

These procedural due process requirements are intended to prevent the arbitrary banishment of a United States resident. A resident alien's "status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him." *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 601 (1952). Permanent resident aliens are encouraged and expected to establish family and economic ties within the United States. Permanent resident aliens, therefore, have "additional rights and privileges not extended to those . . . who are merely here on the threshold of an initial entry." *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958).

The distinctions between aliens present within the United States and those "on the threshold of an initial entry" is preserved in the 1952 Immigration and Nationality Act. Chapter 3 of the Act provides roughly 700 different bases for deporting an alien present within the United States. C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 4.3(a). Chapter 4 of the Act, however, provides that all aliens who present themselves at the border requesting leave to enter are subject to inspection by immigration officials to determine admissibility. 8 U.S.C. §§ 1225-6. See also *Leng May Ma* v. *Barber*, 357

U.S. 185, 187 (1958). If the inspecting immigration officer doubts the alien's admissibility, he refers the matter to an Immigration Judge, who conducts an exclusion hearing. 8 U.S.C. § 1225(b). The degree of procedural due process available in exclusion hearings is substantially less than that available during a deportation hearing. Persons subject to exclusion do not enjoy a seven day notice of charges before the hearing. In addition, there is no right to review the prior statements of witnesses. A discussion of the substantial differences between exclusion and deportation proceedings appears in Note 3., of *Maldonado-Sandoval* v. *INS*, 518 F.2d 278, 280 (9th Cir., 1975).[1]

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[1] The difference between the rights of aliens in exclusion and deportation proceedings was pointed out in *Leng May Ma* v. *Barber*, 357 U.S. 185, (1957). Other crucial distinctions have since emerged. The alien in expulsion proceedings is entitled to all procedural safeguards spelled out in 8 U.S.C. § 1252(b). The government bears the burden of proof and deportability must be established by the "clear, unequivocal, and convincing "rule laid down in *Woodby* v. *INS*, 385 U.S. 276, (1966). Various substantive rights are available in expulsion proceedings: The aliens may designate the country of deportation under § 1253(a). He may seek temporary withholding of deportation on persecution grounds under § 1253(h). He may apply for suspension of deportation or voluntary departure under § 1254; or for adjustment of status under §§ 1255 or 1259. Finally, if aggrieved by the final decision of the Board of Immigration Appeals, the alien in a deportation proceeding has direct recourse to a court of appeals and an automatic stay of deportation under the statutory form of judicial review provided by § 1105a(a).

The alien in an exclusion proceeding is governed by an entirely different set of principles. No matter how long he may have resided here before his brief departure or how deserving his case may be, the alien seeking admission is ineligible for suspension of deportation, voluntary departure, or § 1253(h) relief. If ordered excluded, he may not select the country of deportation but under § 1227(a) must be returned to the country whence he came. Under § 1105a(b), judicial review of a final exclusion order may be had "by habeas corpus proceedings and not otherwise." *Maldonado-Sandoval* v. *INS*, 518 F.2d at 280, Note 3.

Although the Act appears to make a distinction between aliens present within the United States and all aliens, regardless of their resident status, who are seeking to enter the country, this Court has recognized that permanent resident aliens returning from short trips abroad are not ordinarily subject to exclusion proceedings. *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). Before *Fleuti*, permanent resident aliens were subject to a *de novo* review of admissibility each time they attempted to re-enter the United States. In *Fleuti*, the Court circumscribed the operation of the re-entry doctrine by holding that a permanent resident alien entered the United States after a trip abroad only if that trip was "meaningfully interruptive" of residence status. 374 U.S. at 456-60. The Court did not set specific guidelines for determining when a trip is "meaningfully interruptive." Instead, the Court listed several factors for Immigration Judges and courts to consider when making a determination. The factors listed by the Court, if present before the alien left the country, serve to give that alien constructive notice that he is interrupting his residence status by making the trip abroad. The factors included the length of the trip, whether the alien had to acquire special travel documents, and the purpose of the trip. 374 U.S. at 462. The distinction between returning permanent resident aliens and all others as found by this Court in *Fleuti* is supported by the Congressional Record, inferring that Congress intended that some distinction be allowed. See *Fleuti* id., at 456, Note 8.

The plain import of *Fleuti*, therefore, is that despite the fact that the Immigration and Nationality Act provides for the inspection of all aliens arriving at the border seeking entry, 8 U.S.C. §§ 1225-6, permanent resident aliens may not be subjected to exclusion proceedings upon return from a short trip abroad unless that trip was "meaningfully interruptive" of resident status. In this manner, by circumscribing the broad definition of "entry" as contained in the Immigration and Nationality

Act, permanent resident aliens are not considered, even upon returning to the United States, to be the equivalent of an alien attempting to enter the United States for the first time.

B. Summary Exclusion Proceedings Do Not Provide Permanent Resident Aliens With Sufficient Due Process To Protect Residence Status. Respondent Was Prejudiced By Her Subjection To Exclusion Proceedings.

The instant case is a telling example of the need to provide permanent resident aliens more procedural protections upon re-entry than that afforded aliens merely "on the threshold of an initial entry." Respondent attempted to cross the border sometime during the late evening of June 29, 1975. An exclusion hearing took place at 11:00 a.m. on June 30, less than twenty-four hours after her detainment. Pursuant to 8 C.F.R. § 236.2, she was informed of the charges against her at some unidentified point before the hearing. She, in response to a single question from the Immigration Judge, waived her right to counsel. The Immigration Service was not required to present the prior statement of the witness Mr. Polio-Medina. The decision of the Immigration Judge was delivered directly after the hearing. As a result of this summary proceeding, respondent, a five year resident of the United States married to a United States citizen with three children living in this country, was deemed excludable and deportable from the United States.

1. Notice of charges

While expeditious summary exclusion proceedings may be proper to determine the status of an emigrating alien seeking leave to enter the United States, they are quite improper to determine the continued residence status of a permanent resident alien. In this case, a proceeding involving the continued liberty of a five year resident of the country was allowed to proceed the day following the occurence giving rise to the charges. Although notice of the charges was given at some

point prior to the hearing, the expeditious nature of the proceeding precluded Mrs. Plasencia from either understanding the nature of the charges or to prepare an adequate defense. "At a minimum, due process requires that deprivation of life, liberty, or property. . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The instant case, unlike *Mullane*, does not involve a mere deprivation of property. Rather, it involves the indefinite and possible permanent separation of a woman from her husband and children. In short, this case involves "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). Respondent was nevertheless expected to retain counsel, if she so desired, in a little over twelve hours from the time of her initial detention. It is doubtful that a non-English speaking indigent woman, whose husband at the time was unemployed, could have located affordable counsel in the wee hours of a Monday morning at the El Centro Detention Facility over 100 miles from Los Angeles.

At the time of this hearing, the Immigration Judge was not required to inform respondent of the availability of free legal services. 8 C.F.R. § 236.2(a) (1975). This regulation has since been amended to require the provision of such information. 8 C.F.R. § 236.2(a) (1981). This provision does not alter the prejudical nature of the inadequate notice of charges. Had Plasencia been informed of such legal services, and had she located affordable counsel, it is improbable that such counsel would have been able to prepare an adequate defense by the time of the hearing. Respondent was not an emigrant alien seeking initial leave to enter the United States. Such cases are commonplace for immigration lawyers and require no special preparation. As a returning resident alien, however, Plasencia's vulnerability to exclusion proceedings depended upon whether she had made a meaningful interruption of residence status within the scope of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1964).

Such a case, requiring an understanding of a complicated and unsettled area of the law, involving the continued residence status of a permanent resident, surely requires more than twelve hours for the preparation of an adequate defense. Without the opportunity for adequate preparation, whether by Plasencia or counsel, respondent did not have a "full and fair opportunity to be heard" in defense of her continued residence status. Adequate notice of charges, such as that provided in expulsion proceedings, obviates this prejudice.

Petitioner argues (Pet. Brief at 27, n. 15) that respondent might have avoided the prejudice suffered due to inadequate time to prepare simply by asking the Immigration Judge for a continuance. "(N)o regulation specifically authorizes the granting of continuances (in exclusion hearings). But in this case respondent never sought a continuance, and there is no reason to assume that, if respondent had presented valid grounds for one, the immigration judge would have denied such a request." *Id.* Petitioner's blithe statement that continuances might be granted if aliens simply asked for them ignores the realities of the situation. It assumes that persons like respondent, non-English speaking persons with no legal training, know that continuances may be used to delay the date of a hearing. The possibility of a continuance is not mentioned on the notification form. (Joint Appendix at 8). That notice simply informs the alien that the hearing will take place at a specified time. Unless this Court is willing to recognize that knowledge of continuances is common to the entire population of the United States, petitioner's statement exalts the form of possible availability of continuances over the substantive reality of the lack of legal knowledge of the vast majority of permanent resident aliens subject to exclusion proceedings. In addition, petitioner's statement assumes that respondent will, even though no specific regulation authorizes continuances at an exclusion hearing, argue that the absence of specific authorization does not preclude continuances in an exclusion proceeding. Con-

sidering that such specific authorization does exist in deportation hearings, 8 C.F.R. § 242.12 (1981), this argument would be difficult, at best, for even an experienced lawyer to make. One cannot expect a non-English speaking person with no legal training to make such an argument. It is obvious, then, that the fact that continuances are available in theory does not mean that they are available in practice. Before a continuance may be granted, the party must request one. In the vast majority of cases involving permanent residents detained at the border, these parties will not know that such a continuance may exist, much less present valid grounds for one. Petitioner may not, therefore, dismiss the prejudicial nature of the lack of adequate notice of charges simply by stating that a continuance may, in theory, be available to aliens in exclusion proceedings, if they would merely request one.

2. Respondent was improperly permitted to waive her right to counsel

8 C.F.R. § 236.2(a) (1981) provides that aliens subject to exclusion have the right to counsel at their own expense. This right may be waived by the alien. *Ramirez* v. *INS*, 550 F.2d 560, 565 (9th Cir., 1977). Waiver, however, must consist of a voluntary, intelligent relinquishment of a known right or privilege. *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977). In the instant case, the lack of adquate notice of the charges precluded a full understanding of the existence of the right, and the Immigration Judge failed to give an adequate explanation of the scope of the right. As such, the waiver was neither intelligent nor a relinquishment of a known right or privilege.

In *Partible* v. *INS*, 600 F.2d 1094 (5th Cir., 1979), the Court held that a perfunctory statement regarding the right to counsel did not provide an adequate basis for waiver of that right in the absence of a complete explanation by the Immigration Judge as to the complexity of the case and the need for counsel. *Id.*

In *Ramirez* v. *INS*, supra, Ninth Circuit found that an alien's waiver of the right to counsel was proper. In that case an alien subject to deportation insisted upon being represented by a person not admitted to the bar. The Immigration Judge questioned the alien extensively as to this choice, such questioning ranging over two pages of the official record. 550 F.2d at 565, n. 3. After this discussion, the Immigration Judge allowed Ramirez eight days in which to consult free legal services in the area. When the alien remained adamant in her insistence upon her chosen representative, the waiver of counsel was permitted. The Ninth Circuit held the waiver proper, noting that "The Immigration Judge did all he could to allow petitioner an opportunity to obtain acceptable counsel." *Id.*

The record in the instant case clearly shows that respondent, a non-English speaking native of El Salvador, was allowed to waive counsel after the following discussion with the Immigration Judge:

> Q. At the hearing you may, if you wish, be represented by counsel or some other qualified person. Do you want to be represented?
>
> A. No.

(Joint Appendix at 9).

Allowing this returning permanent resident to waive her right to counsel in such a perfunctory manner, in a proceeding involving her right to return to her home and family, does not constitute a voluntary, intelligent relinquishment of a known right to counsel. As such, the waiver of counsel, and the hearing which followed, violated respondent's right to a full and fair opportunity to be heard.

3. Respondent's improper waiver of counsel prejudiced her cause in exclusion proceedings.

The nature of the American legal system makes it difficult for persons without legal training to adequately represent them-

selves on a *pro se* basis. It is due to this difficulty that this Court has held that where a right to counsel exists, the relinquishment of that right must be voluntary, knowing, and intelligent. *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977). The costs to a party appearing *pro se* may be great. As noted above, respondent did not possess the legal acumen to request a continuance of her case. The damage to respondent's cause, however, ranged much farther than her inability to request a continuance.

Due to a lack of adequate representation, respondent was unable to fully utilize her right of cross-examination of government witnesses. The credibility of these witnesses was critical to the disposition of the case. In his oral decision, the Immigration Judge stated that "(d)uring the hearing, I have had an opportunity to fully observe the demeanor of the applicant, Anna Elsa Lopez, and Luis Polio Medina. It is my considered judgment that the testimony of Polio and Lopez is accurate and reflects the events that actually occurred." (Petitioner's Appendix at 29a).

8 C.F.R. § 236.2(a) (1981) provides that an alien "will have a reasonable opportunity . . . to cross-examine witnesses presented by the Government." Cross-examination is intended to force witnesses to provide the fact finder with the full extent of their knowledge of the situation at hand, and to prevent the fact finder from being misled by false statements of witnesses. "(N)o safeguard for testing the value of human statements is comparable to that furnished by cross-examination." 5 *Wigmore on Evidence* § 1367 (rev. ed., 1977). The transcript of the hearing is replete with examples of misleading or inconsistent statements by government witnesses. The statements might well have been clarified upon cross-examination. At the very least, competent counsel would have highlighted the inconsistencies for the Immigration Judge. Such proper cross-examination would have cast doubt upon the credibility of these witnesses, whose testimony was integral to the Immigration

Judge's disposition of the case. (Petitioner's Appendix at 29a). Respondent, however, had no "reasonable opportunity" to cross-examine. She was not represented by counsel, and possessed no legal background which would have allowed her to practice the "art of cross-examination." 5 *Wigmore on Evidence* § 1368 (rev. ed., 1977). Plasencia's feint attempts at cross-examination are paradigm examples of the average person's inability to impeach a hostile witness. (Joint Appendix at 25, 28, 32-33).

Petitioner claims (Petitioner's Brief at 3) that the prejudice suffered by Mrs. Plasencia due to lack of competent counsel was obviated by the fact that the Immigration Judge "advised respondent that she would have the opportunity to examine and object to the evidence presented against her, to cross-examine witnesses and to present evidence on her own behalf." *Id.* Petitioner claims that Mrs. Plasencia's affirmative answer to the Immigration Judge's query "Do you understand your rights?" necessarily means that Mrs. Plasencia was afforded the full protection of those rights. Such a claim misconstrues reality. Respondent was a non-English speaking permanent resident haled before an exclusion hearing less than one day after attempting to re-enter the country. After being told that the hearing involved her very right to return to the United States, respondent was given a laundry list of legal rights theoretically available to her. The Judge, after reciting the list, asked respondent through an interpreter if she understood her rights. An affirmative answer to such a question does not mean that respondent understood the substance of such rights, it might well have meant that she understood the interpretation of the Judge's statement by the official interpreter. Indeed, it is quite improbable that respondent could have understood the substantive nature of the rights recited to her. The intricacies of the rules of evidence are a large part of an attorney's legal education. Such education cannot be duplicated by a simple recitation of the rights to cross-examine, to offer evidence, and to object

to the admission of evidence. If Mrs. Plasencia had answered "no" to the Judge's query, he could have done no more than repeat his recitation. He could not have imparted to Mrs. Plasencia the knowledge necessary to substantively understand the list he had given her. While Mrs. Plasencia might have understood the words the Immigration Judge spoke when relayed to her by an interpreter, she could not have understood the full import of these words.

4. Requiring that the immigration service afford permanent resident aliens sufficient due process to protect their interest in continued residence status does not violate the congressional statutory scheme of exclusion and expulsion.

8 U.S.C. § 1225 provides that aliens arriving at the United States border "shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may proscribe." 8 U.S.C. § 1225(a). The regulations which the Attorney General has promulgated with respect to permanent residents subject to exclusion, however, do not provide sufficient due process protections commensurate with the value of continued residence status. Requiring the Immigration Service to afford permanent residents such due process protections in any hearing in which continued residence status is in issue does not violate the statutory scheme mandated by Congress, but merely requires that the Attorney General promulgate regulations which will not violate fundamental fairness. Requiring the Immigration Service to provide adequate notice of charges, and to insure that aliens knowingly and intelligently waive the right to counsel, therefore, does not violate the statutory scheme, but rather ensures that the Act will be implemented in a manner consistent with what must be assumed to be a Congressional intent, to provide methods by which questions of entry and excludability are determined consistent with notions of fundamental fairness.

Petitioner has made no allegation that to offer permanent resident aliens the protections of deportation proceedings would in any way burden the Immigration Service. Not even an argument of administrative convenience is supportable since the proceedings are so similar in form. The only real differences are in the protections offered the subject of the proceeding.

Petitioner's reference to *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981) (Petitioner's Brief at 31), is inapposite. The specific section of the Act in issue in that case, 8 U.S.C. § 1254, provides for the suspension of deportation of permanent residents in certain cases. The case turned upon the Attorney General's construction of the term "extreme hardship" as contained in 8 U.S.C. § 1254(a)(1). Such a determination is properly made by the Attorney General under such powers granted to him by the Act. This provision, however, does not delegate to the Attorney General the discretion to make this construction in proceedings which violated the alien's right to due process. The instant case, however, does not present a question of a substantive construction of a statutory term. Rather, Mrs. Plasencia's plight involves the very nature of the proceedings by which her right to re-enter the United States is determined. Although Congress may delegate to the Attorney General the ability to make determinations of entry and excludability, it may not delegate to the Attorney General the power to make these determinations in proceedings which contravene the procedural due process protections enjoyed by permanent resident aliens.

C. Allowing The Immigration Service To Determine Questions Of Entry In Exclusion Proceedings Violates Both The Scope And Spirit Of *Rosenberg* v. *Fleuti*.

Rosenberg v. *Fleuti*, supra, stands for the proposition that the Immigration Service may not subject resident aliens to exclusion proceedings upon return from a short trip abroad, unless that trip was so meaningfully interruptive of their residence

status that the return constitutes an entry. In effect, therefore, exclusion of resident aliens is now subject to a two tier test. First, the alien must be returning from a trip abroad which is meaningfully interruptive of residence status. Second, the alien must be excludable.

In cases of resident aliens stopped at the border for immigration offenses, the two tier test enables the Immigration Service to side-step the requirements of *Fleuti* and effectively reimpose the re-entry doctrine. Under *Fleuti*, if the purpose of a resident alien's trip abroad was to accomplish something contrary to the immigration laws of the United States, that trip abroad may be considered meaningfully interruptive of residence status. A permanent resident stopped at the border for an alleged immigration offense, therefore, may find himself subject to exclusion proceedings on the basis of that alleged offense. Once subject to exclusion proceedings, the Immigration Service may exclude the permanent resident, as it did in the instant case, on the basis of that self-same alleged immigration offense. In practical terms, this is a reimposition of the re-entry doctrine. If the resident alien is stopped at the border for an immigration offense, the Immigration Service need not show meaningful interruption of residence status to subject that alien to exclusion. The allegation of excludability on the basis of an alleged immigration offense in and of itself makes the permanent resident's return to the United States an entry. The Ninth Circuit has considered the problems of predicating a resident alien's vulnerability to exclusion proceedings and basing exclusion itself upon the same factual determination in two cases.

1. *Palatian* v. *INS*, 502 F.2d 1091 (9th Cir., 1974)

In December of 1970, resident alien Palatian was arrested at the U.S. border and charged with attempting to smuggle marijuana into the United States. After his conviction for failure to register an incoming narcotic, Palatian was brought before exclusion proceedings. Palatian was held excludable under 8

U.S.C. § 1182(a)(23), which makes the conviction of an alien for any narcotics offense a proper basis for exclusion proceedings. 502 F.2d 1091-92.

Palatian sought and received a writ of habeas corpus from the District Court. The District Court found that Palatian's return to the United States after a short time in Mexico did not constitute an entry within the terms of *Rosenberg* v. *Fleuti*. Upon appeal, the Ninth Circuit reversed. 502 F.2d at 1092.

The Ninth Circuit held *Palatian* distinguishable from *Fleuti*. Noting that the Supreme Court held Fleuti's trip to be "an innocent, casual, and brief excursion by a resident alient outside the country's borders," *Rosenberg* v. *Fleuti*, supra, 374 U.S. at 462, the Court found Palatian's trip to be neither innocent or casual. His actions outside the country and his subsequent return bearing narcotics provided the basis for a narcotics conviction. In this situation, 8 U.S.C. § 1182 clearly expresses Congressional intent. Resident aliens who are convicted of narcotics offenses are, by Congressional fiat, excludable. The Court held that Palatian's conviction was a clear indication that his attempt to return to the United States was intended to effectuate some purpose contrary to United States immigration laws. *Palatian* v. *INS*, *supra*, 502 F.2d at 1093. As such, Palatian's sojourn outside the United States, however brief, was meaningfully interruptive of his residence status, and by the operation of 8 U.S.C. § 1182, he was subject to exclusion proceedings. *Id.* at 1093.

In *Palatian*, one factor satisfied both tiers of the excludability test for resident aliens. The conviction for a narcotics offense served as the predicate for finding a meaningful interruption of resident status, and therefore finding an entry into the United States. The same conviction rendered Palatian excludable. The *Palatian* Court, however, did not reach the issue of whether the effective reimposition of the re-entry doctrine when resident aliens are stopped at the border for immigration offenses

violates the scope of *Rosenberg* v. *Fleuti*. In *Palatian*, the resident alien was not subject to exclusion proceedings simply because of his attempted re-entry. The statute required a conviction for narcotics offense before exclusion hearings could commence. This conviction requirements, which provides the predicate for a finding of meaningful interruption, affords resident aliens more procedural protection than is available in either exclusion or expulsion hearings. The criminal allegation must be proven by the United States beyond a reasonable doubt. The degree of the burden upon the United States, therefore, is greater than the degree of proof needed to expel an alien. In *Palatian*, therefore, the returning resident alien was not subject to a proceeding in which he bore the unenviable burden of showing both no entry and non-excludability.

Palatian expands the Immigration Service's discretion to subject permanent resident aliens to exclusion proceedings. The Immigration Service properly excluded Palatian only because Congress mandated a procedure for exclusion which guaranteed at least the same amount of procedural due process as is available in a deportation proceedings. Without a clear Congressional statement to the contrary, the Immigration Service must have a basis independent of the predicate for exclusion to find that a resident alien's return from abroad constitutes an entry into the United States.

It should be pointed out that the Ninth Circuit found *Palatian* entirely distinguishable from this case. See *Plasencia* v. *Sureck*, 637 F.2d 1286, 1289 (9th Cir., 1980). In *Palatian*, the government had a clear, convincing and unequivocal case upon which to find Palatian excludable based upon the underlying narcotics conviction. In the case against Mrs. Plasencia, or her husband, there was apparently such insufficient evidence against them that the Federal Prosecutor elected not to charge them with a crime, or to bring Plasencia's case before the Grand Jury. The alleged clear, convincing, and unequivocal case found in the summary exclusion hearing was not so unequivocal to other federal authorities.

2. *Maldonado-Sandoval* v. *INS*, 518 F.2d 278 (9th Cir., 1975)

In *Maldonado-Sandoval*, the Ninth Circuit faced the question of whether a resident alien could be subject to exclusion upon an allegation that the immigrant visa was fradulently obtained. 518 F.2d at 278. The resident alien spent three days in Mexico, and upon return was excluded by the Immigration Service under 8 U.S.C § 1182(a)(20), which provides for exclusion of aliens not in possession of a valid visa. *Id.* Maldonado requested a writ of habeas corpus from the District Court, claiming that his return to the United States at the point in question did not constitute an entry sufficient to subject him to exclusion proceedings. *Id.* at 280.

The Ninth Circuit affirmed the District Court's granting of the writ, stating that "(Maldonado's) brief visit to Mexico did not manifest 'an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence.' " *Id.* at 281 (Citations omitted). Strictly speaking, therefore, the Ninth Circuit's holding is a straight application of the *Fleuti* doctrine. If Maldonado had remained in the United States, he would have been subject only to deportation proceedings, with its procedural protections. "To deprive petitioner of the benefit of deportation proceedings in the determination of his case merely because of his brief visit across the border would do violence to both the letter and the spirit of *Fleuti*." *Id.* at 281. The Court, after finding that Maldonado had not made an entry as required by 8 U.S.C. § 1182, stated that:

> When evidence appears, during an exclusion proceeding, that the alien has been theretofore granted residence status and is seeking to return to the United States after a brief visit outside the United States, the exclusion proceeding shall be terminated. If there is also evidence that the alien may have fraudulently secured his residence status, the

> INS can thereupon institute deportation proceedings against him. *Id.*

In such a case the Immigration Service may initiate deportation proceedings under 8 U.S.C. § 1251, which provides for the deportation of all aliens found to be excludable at the time of an entry. If an otherwise excludable alien is mistakenly or fraudulently admitted into the United States, Section 1251 serves as a form of delayed exclusion. It ensures that the territorial integrity of the United States will not be impinged by such improper entries, since there is no statute of limitations upon § 1251 actions. Gordon and Rosenfield, *supra* at § 4.7. Terminating exclusion proceedings upon presentation of evidence that the alien has been granted permanent resident status and that the alien left the country for only a short period of time does not, therefore, mean that the Immigration Service will never be able to deport such aliens. It simply means that such deportation may not be the result of an exclusion proceeding. Congress incorporated all grounds of exclusion into the network of grounds for deportation under 8 U.S.C. § 1251(a)(1) which reads in pertinent part:

> 8 U.S.C. § 1251(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who-(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Through this framework, Congress has insured that an excludable alien can be removed from the United States long after crossing our borders. This statutory scheme further contradicts the position of the Immigration Service in denying Mrs. Plasencia a deportation hearing.

In *Maldonado*, the Ninth Circuit held that a resident alien returning from a short trip abroad is subject only to deportation proceedings. The holding is consistent with the statutory scheme mandated by Congress. 8 U.S.C. § 1251 provides a

fail-safe mechanism for the eventual deportation of permanent residents who are excludable at the time of an entry. The interests of the resident alien, however, are also preserved. By forcing the Immigration Service to proceed only in deportation, the resident alien is afforded the extra procedural protections of those proceedings and is not forced to show both no entry and non-excludability in order to re-enter the United States.

3. Respondent was improperly subjected to exclusion proceedings

In the instant case, the Immigration Judge found that respondent was subject to exclusion proceedings since her return to the United States constituted an entry within the ambit of 8 U.S.C. § 1182. (Petitioner's Appendix at 30a). The basis of the finding of entry was that Mrs. Plasencia's trip to Mexico, although brief, was meaningfully interruptive of her residence status. The Immigration Judge found that, since the purpose of her visit to Mexico was to accomplish something contrary to United States immigration laws, the *Fleuti* test was met, and the trip was meaningfully interruptive. *Id.* In the self-same proceedings, Mrs. Plasencia was found to be an excludable alien due to her violation of 8 U.S.C. § 1182(a)(31), smuggling aliens for gain. The prejudice suffered by Mrs. Plasencia by being subjected to exclusion proceedings is clear from the oral decision of the Immigration Judge. The Judge first found that Mrs. Plasencia had smuggled aliens for gain. (Petitioner's Appendix at 29a). Following this determination, the Immigration Judge stated "*Finally*, I find that applicant made a meaningful departure from the United States . . . and, consequently, is subject to the exclusion provisions of the law upon her return." (Petitioner's Appendix at 30a; emphasis supplied). In this case, therefore, the preliminary question of Mrs. Plasencia's vulnerability to exclusion proceedings in the first place was answered by the substantive determination of the ultimate issue in the case. Mrs. Plasencia violated the immigration laws and therefore fell into a class of excludable aliens, and permanent resident Plasencia

was subject to exclusion proceedings because her alleged violation placed her within a class of excludable aliens. To give effect to such a decision strips *Fleuti* of all meaning and effectively reimposes the re-entry doctrine upon permanent residents, forcing, such resident aliens to undergo a *de novo* review of admissibility each time they cross the border without procedural safeguards.

The Ninth Circuit affirmed the District Court's decision on the writ of habeas corpus. *Plasencia* v. *Sureck*, 637 F.2d 1286 (9th Cir., 1980). The Court, noted the "circularity" of the Immigration Service's reasoning, *Id.* at 1288, stating that "(t)he issue here is whether Plasencia was entitled to have her violation of the immigration laws and purpose of her trip determined in deportation rather than exclusion proceedings." *Id.* The Immigration Service attempted to limit the discussion before the Court to whether a finding that an alien smuggling other aliens for gain while abroad makes the trip meaningfully interruptive of residence status. *Id.* at 1289. Citing *Palatian*, supra, the Immigration Sevice claimed that the determination of meaningful interruption in such a case is properly made by an Immigration Judge in an exclusion hearing. *Id.* The Court, however, distinguished *Palatian*, noting that Palatian was afforded the procedural protection of having the purpose of his trip litigated in a criminal proceeding. *Id.* The Court stated that "(w)hether Palatian had smuggled marijuana had been fully litigated in a criminal proceeding in which he enjoyed his full panapoly of procedural rights. Unlike Plasencia, Palatian was not prejudiced by exclusion rather than deportation hearings." *Id.*

Plasencia, however, did not enjoy the "fully panapoly of procedural rights." Once the Immigration Judge found Plasencia had attempted to smuggle aliens, both tiers of the exclusion test, including the preliminary question of her vulnerability to exclusion proceedings at all, had been answered. The

Court noted the similarity between *Plasencia* and *Maldonado*, pointing out "the manifest unfairness of permitting the Service to use exclusion proceedings to circumvent the deportation proceeding requirement simply because the alien made a brief journey out of the country." 637 F.2d at 1289. Due to the "manifest unfairness" present, the Court held that the question if Plasencia's trip was meaningfully interruptive of residence status could only be litigated in deportation proceedings. *Id.*

The Ninth Circuit holding in that instant case is consistent with this Court's policy, as enunciated in *Fleuti*, of tempering the harshness of the re-entry doctrine upon returning resident aliens. [2] To effectuate *Fleuti* in cases where an alleged immigra-

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[2] The analysis applied by the Ninth Circuit in applying the *Fleuti* re-entry doctrine was stated as follows:

Fleuti was a deportation case. The issue was whether the alien who had been admitted to permanent residence in 1952, had made an "entry" in 1956 when he returned from a brief visit abroad. If he had, then he was arguably deportable under INA § 241(a)(1), 8 U.S.C. § 1251(a)(1), as excludable at the time of his 1956 "entry." The Court held that he had not made an "entry" and hence, was not deportable on that ground.

The Court neither held nor implied that the question of Fleuti's "entry" in 1956 could have been decided in exclusion proceedings. In fact, an earlier case, cited with approval in *Fleuti*, strongly supports the view that even if a permanent alien does make an "entry" after a brief visit abroad, he still cannot be subject to exclusion proceedings.

In *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953), a permanent resident alien left the United States for four months to work on a ship. On his return he was excluded under a regulation which permitted exclusion without a hearing under certain circumstances. The Court found it necessary to decide whether the alien had made an "entry" or whether his journey abroad could have any effect on his ultimate right to remain in the United States. It reversed on the ground that he could not be excluded without the procedural due process to which he would have been entitled had he never left the country. On remand the District of Columbia Circuit held that this meant that he was at least entitled to a hearing at which

tion offense serves as both the basis of a finding of meaningful interruption and as the predicate for actual exclusion, the Immigration Service should only proceed against permanent resident aliens in deportation proceedings. Any other holdings would allow the Immigration Service to sidestep both the scope and the spirit of *Fleuti* by effectively re-imposing the re-entry doctrine upon permanent resident aliens simply by litigating the question of meaningful interruption in an exclusion proceeding.

II

THE IMMIGRATION JUDGE ERRED IN FINDING RESPONDENT EXCLUDABLE DURING EXCLUSION PROCEEDINGS OF JUNE 30, 1975. THERE WAS NO CLEAR, CONVINCING, AND UNEQUIVOCAL EVIDENCE THAT RESPONDENT ATTEMPTED TO SMUGGLE ALIENS FOR PERSONAL GAIN.

Respondent was charged with a violation of 8 U.S.C. § 1182(a)(31), willfully and knowingly aiding the entry of illegal aliens into the United States for personal gain. In his Oral Decision, the Immigration Judge applied a "clear, convincing and unequivocal" test to the evidence presented in respondent's exclusion hearing. (Petitioner's Appendix at 29a). The evidence presented however, was neither clear nor unequivocal.

The testimony of two government witnesses, Polio and Lopez, provided the basis on which the Immigration Judge found that respondent had attempted to smuggle aliens for personal gain. Polio and Lopez, however, offered inconsistent testimony as to the nature of the gain involved for Mrs. Plasencia. Lopez testified that Mrs. Plasencia gave her a Form

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the government was the moving party and had the burden of proof requirements which are not satisfied by exclusion proceedings. *Kwong Hai Chew* v. *Rogers*, 257 F.2d 606 (D.C. Cir., 1958) *Plasencia* v. *Sureck*, 637 F.2d 1286 (9th Cir., 1980).

I-151 "green card" and that she was to pay Plasencia $250.00 for smuggling her across the border. (Joint Appendix at 20-21). Mr. Polio, on the other hand, testified that he was to pay some unidentified party in Los Angeles, and that he assumed that respondent and her husband would be paid by that person. *Id.* at 31.

Other testimony by these two important government witnesses casts great doubt upon their credibility in this matter. At one point during her testimony, Ms. Lopez testified that she had arrived at the border with five other people, including "A wife of an uncle of mine." (Joint Appendix at 20). Upon later questioning by respondent, however, Lopez stated that "I have no family." *Id.* at 25. At this point during the questioning, Mrs. Plasencia was attempting to establish that this "uncle" was in fact a procurer of illegal aliens, a person who provides facilities for aliens to enter the United States illegally. It is quite natural to expect Lopez to attempt to protect a relative by placing the entire onus of the smuggling upon a third party, in this case the respondent.

The testimony of Mr. Polio also shows inconsistency and a possible basis for finding bias. He testified that he was to make payments to the Plasencias indirectly through a third party in Los Angeles. (Joint Appendix at 31). Mr. Polio refused to identify this third party, claiming at one point that "I had his address, but I lost it." *Id.* A short time later, Mr. Polio referred to this person as "That person that I said I had forgotten his name." *Id.* at 32. This testimony shows an effort to protect the real party subject to gain by this transaction, the unidentified person in Los Angeles. By refusing to identify this person, Polio implicated Mrs. Plasencia in an attempt to smuggle aliens for gain. These inconsistencies within the testimony of two of the three government witnesses precludes a finding of a "clear" basis for a determination that respondent smuggled aliens for personal gain.

The testimony of all three government witnesses, read as a whole, shows that the evidence used by the Immigration Judge was not unequivocal. The witness Santillana testified that there was no mention of money when the Plasencias picked him up while hitchhiking. (Joint Appendix at 28). He could not identify Mrs. Plasencia as the person who sold him a Form I-151 "green card." The testimony of the three government witnesses, therefore, presents a conflicting picture. One witness, possibly attempting to protect a family member in Mexico, testified that direct payment was to be made to respondent. Another witness could only testify that he assumed that payment to respondent would be made through an unidentified party in Los Angeles. The final witness claimed that no mention of monetary gain whatsoever was made. Such conflicting testimony is hardly unequivocal.

In order to find that respondent violated 8 U.S.C. § 1182(a)(31), the Immigration Judge had to find that Mrs. Plasencia had attempted to smuggle aliens for personal gain. When the conflicting testimony of the government witnesses is discounted, however, there is no showing that respondent stood to receive personal gain for her actions. The only admitted gain in the case was a $25.00 payment of gasoline money to respondent's husband. Mr. Plasencia, however, was not subject to exclusion. The payment, and the concomitant personal gain, accrued to him, and not to respondent. The Immigration Judge, therefore, erred in finding that the evidence presented in the exclusion proceeding established a clear, convincing and unequivocal fact that respondent smuggled aliens for personal gain.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed.

/s/ GARY H. MANULKIN

Gary H. Manulkin

Attorney for Respondent

Petitioner's Reply Brief

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CLERK

No. 81-129

In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

MARIA ANTONIETA PLASENCIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our opening brief, we showed that the court of appeals ignored the "longstanding distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings" (*Plyler* v. *Doe*, No. 80-1538 (June 15, 1982) slip op. 9 n.12), when it held that the Immigration and Naturalization Service must determine the admissibility of returning resident aliens in a deportation hearing rather than in an exclusion hearing, as provided by Congress in the Immigration and Nationality Act. Respond-

ent advances three arguments in defense of the court of appeals' decision. First, respondent contends that the procedural safeguards available to resident aliens in exclusion proceedings do not satisfy the requirements of due process. Second, respondent argues that it is contrary to *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), for the INS to determine both whether a permanent resident alien has made an "entry" and whether the alien is excludable in a single exclusion proceeding on the basis of a single immigration offense. Third, respondent claims that the evidence at her exclusion proceeding does not support the immigration judge's finding of excludability. These arguments are all unpersuasive.

1. We agree with respondent that a permanent resident alien is entitled to an exclusion hearing that satisfies the requirements of due process. See *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953). But respondent is incorrect in stating (Br. 2) that "[t]he real issue is one of procedural sufficiency." Rather, the central question in this case is whether the clear distinction drawn by Congress in the Immigration and Nationality Act between exclusion and deportation proceedings is to be respected or ignored.

The bulk of respondent's brief (Br. 3-15) is devoted to asserting that the procedural protections afforded to permanent resident aliens in exclusion proceedings are constitutionally deficient because they are not identical to the protections afforded in deportation proceedings. We note at the outset, however, that respondent did not present this contention below. Respondent argued in the lower courts not that she was entitled at her exclusion hearing to the identical safeguards that are available to aliens in deportation hearings, but that she was entitled to

have the issues of her "entry" and excludability determined in a deportation hearing rather than in an exclusion hearing (Resp. C.A. Br. 5-6; R. 19-22).[1] In view of the manner in which respondent framed the issue, it is not surprising that neither court below saw fit to address the different question whether the procedures that were actually made available to respondent at her exclusion hearing failed to satisfy due process standards.[2]

In any event, even if the due process issue was properly raised below and respondent is correct in asserting that the procedural protections available to permanent resident aliens in exclusion proceedings are deficient, the proper remedy is to require the INS to provide the necessary safeguards in exclusion proceedings, not to ignore the congressional policy reflected in the Immigration and Nationality Act by requiring the Service to proceed against excludable aliens only in deportation hearings.[3] As we have dem-

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[1] Although respondent did assert in the district court that she did not intelligently waive her right to counsel and that in the absence of counsel she was denied due process at her exclusion hearing (R. 22-26), the magistrate, whose findings of fact and conclusions of law were adopted by the district court, concluded that respondent had waived her right to counsel (Pet. App. 16a). Respondent did not raise the alleged insufficiency of her waiver of counsel in the court of appeals.

[2] The court of appeals described the issue in this case as "whether [respondent] was entitled to have her violation of the immigration laws and the purpose of her trip determined in deportation rather than exclusion proceedings" (Pet. App. 3a-4a).

[3] Thus, respondent may not assert the alleged denial of due process at her exclusion proceeding as an alternative ground for affirmance of the judgment below, because a decision based on this ground would require modification of the court of

onstrated in our opening brief (at 29-31), the difference between proceeding against a returning permanent resident alien in a "deportation" rather than an "exclusion" hearing is not simply a matter of labels. Rather, by holding that the INS may not proceed against permanent resident aliens who have been stopped at the border and are believed to be excludable except in deportation hearings, the court of appeals has in effect granted an automatic right of return to this class of aliens, a result contrary to the intent of Congress in providing an elaborate procedure for excluding all inadmissible aliens (8 U.S.C. 1225, 1226) and in providing only a limited exception to the entry doctrine in the case of unintended departures by permanent resident aliens (8 U.S.C. 1101 (a)(13)). Moreover, by requiring the INS to admit permanent resident aliens and process them in deportation proceedings, the court, by judicial fiat, has also granted to those aliens who are found to have been excludable at the time of entry the opportunity to apply for various forms of discretionary relief that Congress made available only to aliens in deportation, and not those in exclusion, proceedings. It is quite obvious that these results are not necessary to repair any due process deficiencies in the procedures afforded to permanent resident aliens in exclusion proceedings, and respondent does not contend otherwise.

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appeals' decree. See *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 n.6 (1970). The court of appeals affirmed the district court's judgment directing the Service to proceed against respondent, if at all, only in a deportation proceeding (Pet. App. 13a, 21a). If respondent were to prevail on the ground that she was denied due process, however, the case would have to be remanded to the INS not for a deportation hearing but for a new exclusion hearing.

2. Respondent asserts (Br. 15-24) that when a permanent resident alien seeking reentry is stopped at the border for an alleged immigration offense, it somehow is improper under *Rosenberg* v. *Fleuti*, *supra*, for the INS to find, in an exclusion proceeding, that the alien has attempted an entry and is excludable, on the basis of that single offense. Respondent explains her position as follows (Br. 16):

> Under *Fleuti*, if the purpose of a resident alien's trip abroad was to accomplish something contrary to the immigration laws of the United States, that trip abroad may be considered meaningfully interruptive of residence status. A permanent resident stopped at the border for an alleged immigration offense, therefore, may find himself subject to exclusion proceedings on the basis of that alleged offense. Once subject to exclusion proceedings, the Immigration Service may exclude the permanent resident, as it did in the instant case, on the basis of that self-same alleged immigration offense. In practical terms, this is a reimposition of the re-entry doctrine. If the resident alien is stopped at the border for an immigration offense, the Immigration Service need not show meaningful interruption of residence status to subject that alien to exclusion. The allegation of excludability on the basis of an alleged immigration offense in and of itself makes the permanent resident's return to the United States an entry.

Respondent concludes (Br. 23-24) that "[t]o effectuate *Fleuti* in cases where an alleged immigration offense serves as both the basis of a finding of meaningful interruption and as the predicate for actual exclusion, the Immigration Service should only proceed against permanent resident aliens in deportation proceedings."

It is an understatement to say that respondent's position is without support in the Immigration and Nationality Act. Indeed, the Court in *Fleuti* confirmed that "Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it * * *." 374 U.S. at 461. Here, Congress has determined that any alien who, knowingly and for gain, attempts to smuggle illegal aliens into this country is excludable. 8 U.S.C. 1182(a)(31). The fact that the same evidence that establishes excludability with respect to an alien in respondent's position also shows that the alien attempted an "entry" within the meaning of 8 U.S.C. 1101(a)(13) provides no basis in law for immunizing the alien from being placed in exclusion proceedings.

Although respondent claims that a permanent resident alien like herself is invariably prejudiced by having the issues of entry and excludability determined in an exclusion proceeding, she has failed to articulate any basis for this claim. Respondent's complaint cannot be that permanent resident aliens are denied due process in exclusion hearings, because any such defect can be remedied by requiring the INS to provide exclusion hearing procedures that comport with due process standards. Moreover, the fact that a permanent resident alien in respondent's position has the separate issues of entry and excludability determined in a single proceeding can likewise afford no basis for complaint. Indeed, respondent would have no objection to determination of these issues in a single proceeding—so long as that proceeding is a deportation hearing rather than an exclusion hearing. Because we agree that the procedures available to permanent resident aliens at exclusion hearings must meet the

requirements of due process, we fail to perceive how a permanent resident alien can be prejudiced by having the two issues of entry and excludability determined in an exclusion proceeding that meets those requirements, rather than in a deportation hearing.

Similarly, respondent cannot base her claim on the fact that it is impossible to determine whether a permanent resident alien has made an "entry" and thus is subject to exclusion until the Service has presented its proof at the exclusion hearing.[4] A similar argument could be advanced with respect to the jurisdiction of the United States District Courts over civil or criminal cases. For example, the district courts exercise original jurisdiction of all federal offenses. See 18 U.S.C. 3231. But in any given case, proof of the commission of a federal offense, which is essential to the court's exercise of jurisdiction, is not presented until the trial, when the government establishes the elements of that offense in its case-in-chief. Furthermore, if this is the basis for respondent's complaint, it should make no difference whether the Service proves that the alien's departure was meaningfully interruptive through evidence of an immigration offense that also establishes excludability or through evidence unrelated to the allegations concerning excludability (*e.g.*, by presenting evidence concerning the duration of the trip and the procurement of travel documents). Yet, respondent claims prejudice only in the former situation.

Nor can respondent claim that permanent resident aliens in exclusion hearings will be found excludable

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[4] Respondent erroneously assumes (Br. 18, 21) that a permanent resident alien bears the burden in an exclusion hearing of showing that he did not make an entry and is not excludable. As we showed in our opening brief (at 24-25), that assumption is unwarranted.

even if they have not made an "entry" within the meaning of 8 U.S.C. 1101(a)(13). As we explained in our opening brief (at 9), "if the evidence at an exclusion hearing shows that a permanent resident alien has made a departure that is not meaningfully interruptive of his permanent residence, the hearing must be terminated, the alien must be allowed into the United States, and the Service may proceed against the alien, if at all, only in deportation proceedings." See *Maldonado-Sandoval* v. *INS*, 518 F.2d 278 (9th Cir. 1975).

Neither of the Ninth Circuit decisions on which respondent relies (Br. 16-21) for her claimed entitlement to a deportation hearing supports her position. In the first case, *Palatian* v. *INS*, 502 F.2d 1091 (9th Cir. 1974), a permanent resident alien was arrested at the border for attempting to smuggle marijuana into the United States. Following the alien's conviction for failure to pay the required tax, the INS placed him in exclusion proceedings, where the immigration judge found him excludable pursuant to 8 U.S.C. 1182(a)(23), which provides for the exclusion of any alien who has been convicted of a violation of any law relating to the illicit possession of or traffic in narcotic drugs or marijuana, or governing or controlling the taxing of marijuana. The district court granted the alien's petition for a writ of habeas corpus, concluding that the alien did not make an "entry" upon his return to the United States. The Ninth Circuit reversed, holding that by attempting to smuggle marijuana into this country the alien had sought to accomplish an object that was contrary to a policy of the immigration laws. Accordingly, under *Fleuti*, the alien's return constituted an "entry" because his trip was meaningfully interruptive of his

permanent residence and he thus was subject to exclusion. Contrary to respondent's contention (Br. 18), nothing in *Palatian* suggests that the INS "must have a basis independent of the predicate for exclusion to find that a resident alien's return from abroad constitutes an entry into the United States." As Judge Wallace pointed out in dissent below (Pet. App. 9a-10a), the mere fact that the statute under which Palatian was excluded required a conviction for a drug-related offense does not establish that a resident alien at an exclusion hearing may not be found both to have made an entry and to be excludable on the basis of conduct violating a different provision of the Immigration and Nationality Act that does not require proof of a conviction.

The second case cited by respondent, *Maldonado-Sandoval* v. *INS*, *supra*, is discussed in our opening brief (at 22-23 n.12). In that case, the Ninth Circuit vacated an order excluding a permanent resident alien because the evidence at the exclusion hearing showed that the alien had made a *Fleuti*-type departure and thus did not make an "entry" upon his return to this country. Respondent's reliance on *Maldonado-Sandoval* is misplaced for the reasons expressed by Judge Wallace in his dissent below (Pet. App. 10a):

> [*Maldonado-Sandoval*] is distinguishable from *Palatian* and the instant case because the alien in *Maldonado-Sandoval* was not engaged in any illegal activity when he attempted to reenter the United States. In *Maldonado-Sandoval*, we held that the resident alien's two or three day trip to Mexico was an " 'innocent, casual, and brief excursion,' " and "did not manifest 'an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence.' " [518 F.2d] at 281, *quoting*

Rosenberg v. *Fleuti*, *supra*, 374 U.S. at 462, 83 S.Ct. at 1812. In *Palatian* and in the instant case, on the other hand, there was no "innocent, casual, and brief excursion." The excursions in both cases were for illegal purposes, and were meaningfully interruptive of the aliens' permanent residences.

3. Respondent's final contention (Br. 24-26) is that the evidence at her exclusion hearing failed to support the immigration judge's finding of excludability. This contention is not fairly comprised within the question presented; moreover, it may not serve as an alternative ground for affirmance because if respondent is correct there would be no basis for remanding this case to the INS for deportation proceedings. In any event, neither the district court nor the court of appeals addressed this fact-bound question, and there is no reason for this Court to do so in the first instance, especially since the immigration judge's finding of excludability was based, in large measure, on his assessment of the relative credibility of the witnesses who testified at the exclusion hearing. The judge concluded (Pet. App. 29a) that "the testimony of [the Service's witnesses] is accurate and reflects the events that actually occurred. On the other hand, [respondent's] testimony is incredible and not worthy of belief."

For the foregoing reasons and those presented in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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Docket Sheet

NO. 81-129-CFX	TITLE Michael LANDON, District Director of the Immigration and Naturalization Service, Petitioner v. Maria Antonieta Plasencia

DOCKETED	COURT
July 21, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondent: Denis W. Campbell, Peter A. Schey, Gary H. Manulkin
May 15, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until July 22, 1981 by Rehnquist, J, on May 20, 1981.
July 21, 1981	Petition for writ of certiorari filed. (Record filed)
Aug. 26, 1981	Order extending time for respondent to file brief in opposition until 9/21/81 filed.
Sept. 28, 1981	Motion of respondent for leave to proceed in forma pauperis and brief in opposition filed.
Oct. 7, 1981	DISTRIBUTED. 10-30.
Oct. 26, 1981	Reply memorandum for the petitioner filed.
Nov. 16, 1981	Record requested. (Filed Dec. 7, 1981)
Dec. 7, 1981	REDISTRIBUTED. 12-11.
Jan. 4, 1982	REDISTRIBUTED. 1-8.
Jan. 11, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

Feb. 23, 1982	Order extending time to file the Government's appendix and brief on the merits until March 8, 1982.
March 5, 1982	Order furhter extending time to file the joing appendix and the Government's brief on the merits until March 22, 1982.
March 24, 1982	Joint appendix filed.
March 24, 1982	Brief for the petitioner filed.
Apr. 23, 1982	Order extending time to file the respondent's brief on the merits until May 21, 1982.
May 20, 1982	Brief for the respondent filed.
Aug. 5, 1982	CIRCULATED.
Sept. 20, 1982	Reply brief for the petitioner filed. (D).
Oct. 5, 1982	ARGUED.